

IN THE U.S. DISTRICT COURT.
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION
CAUSE NO. CV-07-166-BLG-CSO

TIMOTHY McCULLOUGH	:	
	:	
Plaintiff	:	COURT TRANSCRIPT
	:	
vs.	:	Volume III
	:	
JOHNSON, RODENBURG & LAUINGER:	:	
	:	
Defendant	:	

April 16, 2009

R E P O R T E D B Y:

VIRGINIA LEYENDECKER, Certified Shorthand
Reporter, (NJ License No. 1701) and Notary Public, on
the above date, commencing at 8:30 a.m., at the
James F. Battin United States Courthouse, 316 North
26th Street, Billings, Montana.

BEFORE: Hon. Carolyn S. Ostby

VK LEYENDECKER, LLC
20 Medicine Crow Road
Columbus, Mt. 59019 - (406) 322-5061

1 A P P E A R A N C E S:

2 HEENAN LAW FIRM
3 BY: JOHN HEENAN, ESQUIRE
4 For the Plaintiff

5 BOHYER, SIMPSON & TRANEL, P.C.
6 BY: FRED SIMPSON, JR., ESQUIRE
7 and JOHN BOHYER, ESQUIRE
8 For the Defendant

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WITNESS

Lisa Lauinger

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(The following discussion took place in chambers:)

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THE COURT: The record will reflect we are in chambers with counsel for the settling of instructions. Last evening, after we recessed for the day and the jury had left, I provided counsel with the Court's final jury instructions numbered 16 through 43.

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So let me ask the plaintiff first, does the plaintiff have any objections to the Court's proposed Instructions 16 through 43?

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MR. HEENAN: We will talk about instructions that aren't being given later, correct?

16

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THE COURT: Yes, but if you wish to discuss one of your proposed instructions in connection with one that I'm giving, you certainly may do that.

20

21

MR. HEENAN: Thank you, Your Honor.

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THE COURT: I should also reflect that I gave the parties a proposed Special Verdict Form. So if you have any objections, Mr. Heenan, to that, this is the time to state that.

1 MR. HEENAN: I have no objections
2 to the Special Verdict Form. With respect to the
3 jury instructions, regarding the definition of
4 malice, which would be Instruction Number 26, we
5 had submitted something from the Court's January
6 8, 2009 order citing Plouffe for the legal
7 proposition that there is a rebuttable
8 presumption of malice if the jury finds the
9 absence of probable cause. That's not reflected
10 in this instruction.

11 THE COURT: Where is your
12 proposed instruction to that effect? Do you have
13 the number of that?

14 MR. HEENAN: Sure.

15 THE COURT: What number?

16 MR. HEENAN: There's the rub for
17 my failure to give you numbers, Your Honor. Do
18 you want me to go back through and number them,
19 or do you want me to show you?

20 The instruction that we proposed
21 was from *Seltzer v. Morton* in determining whether
22 the defendant initiated the lawsuit with malice
23 for purposes of a malicious prosecution claim.

24 THE COURT: Go through and number
25 them. We won't have a clear record if they are

1 not numbered, and I did go through and number.

2 MR. SIMPSON: May I ask a
3 question?

4 THE COURT: Sure.

5 MR. SIMPSON: Yesterday, I
6 thought the Court had indicated there would be a
7 flow sheet or spreadsheet which hooked up the
8 Court's instructions with relation to the
9 parties' submitted instructions.

10 THE COURT: Right, but I told you
11 because the defense rested sooner than we thought
12 and we were giving them to you with so much time
13 to look at them yourself, we weren't going to do
14 that.

15 MR. SIMPSON: Sorry. Thank you.

16 MR. HEENAN: Number 7,
17 plaintiff's proposed 17, Your Honor.

18 THE COURT: So the plaintiff is
19 proposing that plaintiff's 17 be given in
20 addition to the Court's, or in place of one of
21 the Court's?

22 MR. HEENAN: In addition to the
23 Court's, Your Honor.

24 THE COURT: Does the defendant
25 have any objection to that?

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1 MR. SIMPSON: I believe it's
2 redundant to one of the ones that the Court has
3 already determined to give.

4 THE COURT: I'm quite sure there
5 is not an instruction on the inference. There
6 are instructions on investigation, and in
7 addition, I want to talk with the parties about
8 their proposed instructions from yesterday, which
9 include that as well.

10 So I gather is that what you're
11 referring to is the investigation? So it's the
12 second sentence.

13 MR. SIMPSON: Yes.

14 THE COURT: So the defendant has
15 no objection to the giving of plaintiff's 17,
16 first sentence only?

17 MR. SIMPSON: No, we do object to
18 that because I don't believe that the inference
19 portion of that is the correct statement of the
20 law.

21 THE COURT: That is what Plouffe
22 says. Do you have any authority to the contrary?

23 MR. SIMPSON: No, Your Honor.

24 THE COURT: I will add to the
25 instructions. Where do you propose that be

1 added, Mr. Heenan? I would propose it would be
2 27-A.

3 MR. HEENAN: That would be ideal.
4 Thank you, Your Honor.

5 THE COURT: But it will not
6 include the second sentence, only the first
7 sentence.

8 MR. HEENAN: I agree with
9 counsel. The second sentence is redundant -- not
10 redundant, but covered by the Court's
11 instructions.

12 THE COURT: Go ahead.

13 MR. HEENAN: The only other thing
14 I would add, Your Honor, it doesn't reference any
15 of the Court's proposed instructions, but the
16 Court, as I understand it, is going to instruct
17 the jury as to what Rule 36 of the Montana Rules
18 of Civil Procedure say.

19 Yesterday we submitted Rule 11 of
20 the Montana Rules of Civil Procedure. I have
21 concerns that if we are going to tell the jury
22 one of the rules of the Rules of Civil Procedure,
23 we ought to tell them both of the rules that are
24 in plaintiff's case.

25 THE COURT: I reached the same

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1 conclusion last night in reviewing the proposed.
2 And I will give to the parties 29-A, which is not
3 in your packet. And it's not exactly as proposed
4 by the plaintiff.

5 MR. HEENAN: We have no
6 objection. That's all of the issues that
7 plaintiff has, Your Honor.

8 THE COURT: Does the plaintiff,
9 then, object to the refusal of any of the
10 plaintiff's offered instructions?

11 MR. HEENAN: No, Your Honor.

12 THE COURT: Turning, then, to the
13 defense. First of all, let's talk about 29-A.
14 Any objection to 29-A?

15 MR. SIMPSON: Yes, Your Honor,
16 there is. Our position is that our client's not
17 being adjudged according to whether it violated
18 Rule 11 in this case. It's not been an issue
19 that's been asserted in the pleadings that the
20 Court, with authority to sanction my client for
21 violation of Rule 11 of the State District Court
22 in the underlying debt-collection action, it's
23 our position that the giving of 29-A would be
24 improper.

25 THE COURT: Well, it will be

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1 given because not only did the plaintiff raise
2 this but the defendant raised this with respect
3 to the plaintiff's pleadings. So I think it has
4 been injected by both parties as an issue in this
5 case. So 29-A will be given.

6 Any other objections, Mr.
7 Simpson, to the Court's instructions?

8 MR. SIMPSON: Yes. The objection
9 first to Instruction Number 22, just, again, on
10 the grounds that the Unfair Trade Practices Act
11 has no application here and we have already
12 briefed that issue in our briefing. So I won't
13 reiterate those grounds.

14 THE COURT: Okay. 22 will be
15 given.

16 MR. SIMPSON: Instruction 23 we
17 object to on the grounds that there is not
18 sufficient evidence in the record to support a
19 malicious prosecution claim against the
20 defendant.

21 THE COURT: That objection will
22 be overruled.

23 But I do want to alert the
24 parties. This is the only other instruction that
25 differs from the ones given to you yesterday. It

1 differs only in a minor area. It's easier for me
2 to read if the 'that' is included before each of
3 the elements. So I will read it as, To prove
4 malicious prosecution plaintiff must show, Number
5 1, that a judicial proceeding was commenced;
6 Number 2, that defendant -- that's just a
7 grammatical change.

8 Then, Number 6, as it was given
9 to you, it didn't have causation. So Number 6
10 would be that the defendant's action caused
11 plaintiff damages.

12 Any objection to those changes?

13 MR. SIMPSON: Not to the changes,
14 Your Honor.

15 MR. HEENAN: No, Your Honor.

16 THE COURT: You may continue.

17 MR. SIMPSON: We object, the
18 defendant objects to Instruction Number 26.
19 Primary grounds of the objection is that it's
20 confusing in light of Instructions 37 and 39,
21 which also reference malice. And I don't know if
22 the best time to go through that is at this stage
23 or when we reach Instructions 37 and 39.

24 But in essence, malice is being
25 defined in Number 26 with reference to a wish to

1 vex, annoy or injure another person, or,
2 alternatively, under Subpart 2, effectively that
3 is the definition of actual malice from the
4 statute.

5 When we get to Instruction Number
6 37, which discusses the standard by which a jury
7 can determine whether it will award punitive
8 damages, it again references the term malice,
9 which is subsequently defined in Instruction 39,
10 only with reference to the statutory definition
11 of actual malice contained, I believe, in
12 27-1-2-21, and I think there is a risk there that
13 the jury will be confused as to which standard
14 will be applied when you get to the punitive
15 damages question.

16 THE COURT: Is it the defendant's
17 position that 26 incorrectly states the standard
18 of malice for purposes of a malicious prosecution
19 action? If so, how and what is your authority?

20 MR. SIMPSON: I don't have any
21 authority to state whether it incorrectly states
22 the standard from a malicious prosecution action,
23 but I think the risk of confusion is enough that
24 simply giving the definition of actual malice as
25 defined in the Montana Code is sufficient to

1 cover either basis.

2 THE COURT: That objection will
3 be overruled because the instruction does clearly
4 state for purposes of a malicious prosecution
5 claim, and the actual malice in the later
6 instructions to which counsel refers is in the
7 statutes with respect to punitive damages. And
8 counsel cites an authority that this is an
9 incorrect statement of malice for purposes of a
10 malicious prosecution claim. So please continue.

11 MR. SIMPSON: We object to
12 Instruction 27. It's our position it's an
13 incorrect statement of the law, and at this time
14 I don't have any authority to cite in support of
15 my position, Judge.

16 THE COURT: That will be given.

17 MR. SIMPSON: We object to
18 Instruction 28. It's our position that the
19 evidence is insufficient to support a claim for
20 abuse of process going to the jury. It's also
21 our position that Element 2 is effectively
22 duplicative of Element Number 1.

23 THE COURT: That will be given.

24 MR. SIMPSON: We already covered
25 the objection to 29-A. We object to Instruction

1 Number 30, not on the grounds that it incorrectly
2 summarized the Court's earlier order but simply
3 on the grounds that we disagree with the
4 substance of that order, Your Honor.

5 THE COURT: Okay. That will be
6 given.

7 MR. SIMPSON: We object to Number
8 32 on the grounds that it's not supported by the
9 evidence in this case and it's cumulative in
10 light of Instruction Number 31.

11 THE COURT: I'm confused by your
12 last objection.

13 MR. SIMPSON: That it's
14 cumulative?

15 THE COURT: Yes.

16 MR. SIMPSON: Well, it's simply
17 saying that you may again award damages and
18 Number 31 instructs the jury that it can award
19 damages already.

20 THE COURT: 31 is an introductory
21 instruction with respect to all of the damage
22 instructions and advises the jury, for example,
23 that by instructing them on damages the Court
24 doesn't mean to suggest for which party the
25 verdict should be rendered. And so 32 tells them

1 that because the Court determined that the Fair
2 Debt Collection Practices Act was violated they
3 must determine the damages that resulted from
4 that violation, and that the damages that can be
5 awarded from that violation in this case are the
6 humiliation, embarrassment, et cetera.

7 So I overrule that objection. I
8 don't think those two are duplicative.

9 MR. SIMPSON: 33 we object to on
10 the grounds that there isn't sufficient evidence
11 to support a claim of emotional distress going to
12 the jury.

13 THE COURT: 33 will be given.

14 MR. SIMPSON: We object to
15 Instruction Number 34 on the grounds that, as set
16 forth, I believe, at the pretrial conference,
17 it's our position it is for the Court rather than
18 the jury to decide whether statutory damages or
19 the amount of statutory damages should be awarded
20 in a Fair Debt Collection Practices Act, and
21 that's based on the lame duck statute.

22 THE COURT: I understand that
23 objection. And we will give Instruction 34 for
24 reasons we discussed at the final pretrial
25 conference.

1 MR. SIMPSON: We object to
2 Instruction Number 35, and, in particular, the
3 last sentence is tantamount to a directed
4 verdict. It simply says, If you find for
5 plaintiff on the question of liability, your
6 award should include compensation for mental or
7 emotional distress, and it's negated the cause
8 element.

9 THE COURT: What about that, Mr.
10 Heenan?

11 MR. HEENAN: Whatever the Court's
12 preference is, Your Honor.

13 THE COURT: This instruction, as
14 I recall, was taken from one of the parties'
15 proposed instructions that included in that last
16 sentence that your compensation should include,
17 and then listed the various types of awardable
18 damages. Because the evidence in this case only
19 was presented with respect to mental or emotional
20 distress, I then eliminated all of those others
21 which left only that one.

22 I understand your objection here.
23 What do you propose be done to fix it? What if
24 we just said, If you find for plaintiff on the
25 question of liability, you may award compensation

1 for --

2 MR. SIMPSON: Mental or emotional
3 distress caused by the defendant's violation?

4 THE COURT: Yes. Any objection
5 to that, Mr. Heenan?

6 MR. HEENAN: No, Your Honor.

7 THE COURT: If you find for
8 plaintiff on the question of liability, you may
9 award compensation for mental or emotional
10 distress -- what did you say? Caused by --

11 MR. SIMPSON: Caused by the
12 defendant's conduct.

13 THE COURT: Okay. We will make
14 that change.

15 MR. SIMPSON: We object to
16 Instruction 37 on the grounds that it's our
17 position punitive damages claim is not supported
18 by the evidence. Also, as stated earlier with
19 respect to Instruction Number 26, Instruction 37
20 might be misconstrued if plaintiff refers to 26
21 in an attempt to determine how to resolve the
22 punitive damages question.

23 THE COURT: 37 will be given.

24 MR. SIMPSON: We object to
25 Instruction 38. It's our position that under

1 *State Farm v. Campbell*, the correct burden of
2 proof is beyond a reasonable doubt rather than
3 clear and convincing evidence. Also, if it's to
4 be given as is, I think it would be more clear to
5 the jury if it were to state, clear and
6 convincing means more than preponderance of the
7 evidence but less than beyond a reasonable doubt.

8 THE COURT: Okay. 38 will be
9 given.

10 Well, let me ask the plaintiff,
11 did you have any objection to stating in 38 that
12 clear and convincing is more than a preponderance
13 but less than a reasonable doubt?

14 MR. HEENAN: Can I look over
15 Fred's shoulder?

16 We would object as cumulative
17 because the instruction defines what clear and
18 convincing means to the jury.

19 THE COURT: I think it will be
20 given as is because we haven't defined beyond a
21 reasonable doubt, so I think that could add some
22 lack of clarity.

23 MR. SIMPSON: I don't have any
24 objections to the other instructions, but I
25 wanted to state an objection, or perhaps a

1 request a change to the Special Verdict Form.

2 THE COURT: Okay.

3 MR. SIMPSON: The defendant is
4 not objecting to the questions as framed.
5 However, it's our position that there should be
6 an instruction following Question Number 3 that
7 effectively tells the jury, if you answer no to
8 Questions 1, 2 and 3, don't answer Questions 4
9 and 5. Have the foreperson sign the verdict
10 form. Because if the jury doesn't find for the
11 plaintiff on one, two or three, it seems like
12 they can't award damages.

13 THE COURT: What about the Fair
14 Debt Collection Practices Act?

15 MR. SIMPSON: Good point.

16 MR. BOHYER: Do smiles show up on
17 the record?

18 THE COURT: No. I don't think
19 they do.

20 MR. SIMPSON: Good point.

21 THE COURT: Any other objections
22 to the Special Verdict Form?

23 Any objections that the
24 defendant has to the plaintiff's refusal of any
25 of the defendant's offered instructions?

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1 MR. SIMPSON: The rejection or
2 refusal of Defendant's Number 6.

3 THE COURT: For the reasons
4 you've already stated?

5 MR. SIMPSON: Yes.

6 THE COURT: Okay. You can go
7 ahead.

8 MR. SIMPSON: Thank you.
9 Rejection or refusal of Defendant's Number 14;
10 refusal of Defendant's 15; refusal of Defendant's
11 19; refusal of Defendant's 20; refusal of Number
12 23; refusal of Number 24; and refusal of Number
13 25.

14 THE COURT: Okay. Those
15 instructions are refused.

16 Anything further anyone wants to
17 state with respect to the Court's jury
18 instructions and Special Verdict Form?

19 MR. HEENAN: No.

20 MR. SIMPSON: Your Honor, could I
21 have one minute to review the stipulations that
22 we reached to see if there are any we wanted you
23 to give the jury?

24 THE COURT: Certainly.

25 MR. SIMPSON: No.

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1 THE COURT: Okay. This is well
2 timed. You have about 10 minutes.

3 Oh, Mr. Heenan. 35 minutes to
4 begin with and leaving yourself 10 or what?

5 MR. HEENAN: 30, 15.

6 THE COURT: So I give you the
7 25-minute and 10-minute warning.

8 MR. HEENAN: I appreciate it.

9 THE COURT: I will be gentle.

10 (Brief recess.)

11 THE COURT: Good morning. The
12 record will reflect that the parties, counsel and
13 the jury are present.

14 I apologize to the jury that we
15 are starting at 9:30 rather than 9:15, as I told
16 you. It's not because we have been drinking
17 coffee but working hard on finalizing the
18 instructions on the law to you.

19 Now is the time, as I told you,
20 for the attorneys to make their closing arguments
21 to you.

22 You may close for the plaintiff,
23 Mr. Heenan.

24 MR. HEENAN: Thank you, Your
25 Honor. And may it please the Court, counsel and

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1 ladies and gentlemen of the jury.

2 This is a law firm that broke the
3 law. This is a law firm that acted illegally.
4 This federal judge already said that the law firm
5 broke the law. You've now heard all the
6 evidence. You now have seen and heard how this
7 law firm broke the law.

8 You've also heard they do it all
9 the time. They did it with impunity. They come
10 into the courtroom in the face of a federal judge
11 that said, You broke the law, they smile at you,
12 ladies and gentlemen, and say, We have done
13 nothing wrong. And you, ladies and gentlemen,
14 today can stop them.

15 Instruction Number 30, please.

16 In a moment the Court will
17 instruct you as to the law that applies in this
18 case. I want to take this opportunity to go
19 through some of the judge's instructions. We
20 don't have time to go through them all. I want
21 to move fast. This is an important one, though,
22 Number 30.

23 The Court, Her Honor, has already
24 ruled prior to the start of this trial some legal
25 findings, findings which you, the jury, must

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1 accept as true.

2 Number 1, Johnson, Rodenburg &
3 Lauinger violated the Fair Debt Collection
4 Practices Act by demanding attorneys' fees from
5 Mr. McCullough which were not permitted under
6 Montana law.

7 Number 2, Johnson Rodenburg
8 violated the Fair Debt Collection Practices Act
9 by filing a lawsuit against Mr. McCullough which
10 was barred by the statute of limitations in
11 Montana.

12 Number 3, Johnson Rodenburg
13 violated the Fair Debt Collection Practices Act
14 by continuing to maintain a lawsuit against Mr.
15 McCullough which was barred by the statute of
16 limitations of Montana.

17 And Number 4, Johnson, Rodenburg
18 & Lauinger violated the Fair Debt Collection
19 Practices Act by serving the requests for
20 admission on Mr. McCullough in an abusive, unfair
21 and unconscionable attempt to collect a
22 time-barred debt.

23 That's the law, ladies and
24 gentlemen, that you need to follow in your
25 deliberations as instructed to you by this judge.

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1 So we don't start from scratch
2 like in most trials. We started with the
3 acknowledgement, before you got here, before we
4 started this trial, that this law firm broke the
5 law. And yet what have you heard from them?
6 What was their defense? No, we didn't. We
7 didn't do anything wrong, not a single thing
8 wrong. And they certainly didn't come here to
9 apologize. They didn't come here to apologize to
10 Mr. McCullough. They came here to call him a
11 liar.

12 What about the evidence? How do
13 we know it's illegal? What did you hear?

14 Instruction Number 29-A, please.

15 The law in Montana obligates
16 lawyers that want to come to our state and
17 practice law in our state, when they sign legal
18 documents and sue people and when they bring
19 people into court, they need to conduct a
20 reasonable inquiry and make sure that it's well
21 grounded in fact.

22 And what that means, ladies and
23 gentlemen, is Montana does not tolerate frivolous
24 lawsuits. We do not put up with frivolous
25 lawsuits in this state and we do not put up with

1 lawyers who file frivolous lawsuits.

2 In Montana, you don't sue people
3 without evidence. That's the law. You heard
4 Andy Patten. Mr. Patten, he is a well-regarded,
5 well-experienced, highly credible, highly ethical
6 collection lawyer. And what did Mr. Patten tell
7 you? He said you don't sue people without
8 evidence. You have to do an independent inquiry
9 into the facts. You can't blindly accept
10 information from a company like CACV, especially
11 when they say, Don't believe us. Don't believe
12 what we tell you. Do your own independent
13 investigation.

14 And that applies not just to
15 collection cases, but to any case. If someone
16 wants to file a lawsuit because of a car
17 accident, you don't just run to court and file
18 the lawsuit. You get the police report. You get
19 some medical records. You independently verify
20 that there's a claim. That's what lawyers in
21 Montana have to do. And if they don't do it,
22 then they are filing frivolous lawsuits. And
23 that's not allowed or permitted in Montana.

24 So the judge has found, and you
25 need to follow her instruction to you, that

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1 Johnson Rodenburg broke the law in the four ways
2 we went through under the federal Fair Debt
3 Collection Practices Act.

4 So what claims are left? The
5 first claim is this Unfair Trade Practices Act
6 claim.

7 Instruction 22, please.

8 What does it mean to violate the
9 Unfair Trade Practices Act? It means, when
10 someone's conduct constitutes unfair deceptive
11 acts or practice in the conduct of any trade or
12 commerce.

13 This claim isn't brought against
14 Johnson Rodenburg as a law firm. It's brought
15 against Johnson Rodenburg as a debt collector
16 which uses our Montana court system to collect
17 debts. We showed you how they do it and there is
18 no dispute about how they do it. They file the
19 lawsuits, get judgements against people that
20 can't defend themselves, and take those
21 judgements and they garnish their wages, raid
22 their banks, put liens on their homes. That's
23 how they collect debts. They use the court
24 system.

25 And that's why we are on trial

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1 and that's why they violated this Unfair Trade
2 Practices Act. Because they are a debt collector
3 and because their conduct toward Mr. McCullough
4 was unfair and deceptive. And you heard the
5 evidence and you've now been shown the Court's
6 rulings in that regard.

7 They propound these requests for
8 admission. We looked at them. We looked at the
9 legal mumbo jumbo that they put in. And what's
10 not in there? 30 days to respond or you're going
11 to lose.

12 Why do they do that? Because
13 that's the way Johnson Rodenburg can win a
14 lawsuit without having any evidence whatsoever in
15 their file, not a shred of evidence. They know
16 because they're lawyers and they are up against
17 people like Mr. McCullough who aren't lawyers.
18 They know that they can use their law degree to
19 win a case without evidence.

20 That's not fair in Montana. And
21 that's not allowed in Montana and that's illegal
22 in Montana.

23 Instruction Number 23.

24 The next claim that you ladies
25 and gentlemen need to decide is what is called

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1 malicious prosecution. As I told you, in
2 Montana, the law does not tolerate lawsuits that
3 are brought maliciously, lawsuits that are
4 brought without probable cause. So what do you
5 need to determine to decide whether this was a
6 malicious prosecution against Mr. McCullough?
7 That a proceeding was commenced and prosecuted
8 against him. We know that. They sued him in
9 state court, right across the street; that the
10 defendant was responsible for instigating,
11 prosecuting or continuing the proceeding.
12 Johnson Rodenburg signed the lawsuit and they
13 prosecuted the lawsuit. That it was acted
14 without probable cause.

15 Well, what does probable cause
16 mean?

17 Instruction Number 27, please.

18 Probable cause means whether the
19 defendant could or should have made further
20 inquiry or investigation as an ordinarily prudent
21 person.

22 Here we are talking about a
23 prudent law firm. And who is the prudent law
24 firm that we showed you? It's Mr. Patten, an
25 ethical, honest, fair, law-abiding collections

1 lawyer who told you what it takes for a
2 collections lawyer in Montana to have probable
3 cause to sign their name on a Complaint and sue
4 someone and hale them into court. He told you
5 and that evidence came in unchallenged, ladies
6 and gentlemen. Johnson Rodenburg brought you no
7 one to refute anything that Mr. Patten said.
8 Unchallenged.

9 It's not what you can do in
10 Montana. Other states, I don't know. But
11 Montana, when a lawyer signs the lawsuit, they
12 are saying to the Court, We have done our
13 homework. We have done an investigation. We
14 have looked at it independently. We haven't
15 adopted whole e-mails from our client. And we
16 have documents in our file that would be evidence
17 that we could use when we get to court to prove
18 our claim and win.

19 And the evidence was here, ladies
20 and gentlemen, that Johnson Rodenburg didn't have
21 any evidence, no evidence whatsoever, when they
22 sued Mr. McCullough. And that's not what a
23 prudent law firm would do. A prudent law firm, a
24 law firm that follows the law, isn't going to
25 file a lawsuit without evidence. They are not

1 going to file a lawsuit without doing an
2 investigation.

3 If we could go back to Number 23,
4 please.

5 What else for probable cause?
6 Not only do they not get any documents, but right
7 in their own file it showed that this information
8 they were relying on was false. Right in their
9 own file it showed that Mr. McCullough had
10 already been sued. You heard Mr. Dendy say that
11 he never called anyone to do any kind of
12 follow-up as to why the first lawsuit was
13 dismissed. They just filed a lawsuit.

14 What's the next element? Malice.
15 What does malice mean?

16 Number 26, please.

17 Malice can be one of two things.
18 One, it can be a wish to annoy, vex or attempt to
19 do a wrongful act. Or it can be where the
20 defendant has knowledge of facts or intentionally
21 disregards facts that create a high probability
22 of injury.

23 We don't think Johnson Rodenburg
24 was out to get Mr. McCullough. We just think
25 they didn't care about him. He was just a name

1 on a batch, a name on a spreadsheet, one on a
2 list of all the people that Johnson Rodenburg was
3 to sue that day.

4 I'll bet you Johnson Rodenburg
5 knows more about Mr. McCullough now than they
6 know about any one of the thousands of people
7 they sue. And they only know about it now
8 because he stood up for himself and haled them
9 into court and called them out to task for their
10 conduct towards him. And they now learned a lot
11 about Mr. McCullough.

12 What else can I show you to help
13 you understand malice?

14 27-A, please.

15 Johnson Rodenburg is a law firm.
16 They are not a person. They are a legal entity.
17 They are an entity on paper. We can't get inside
18 their head. We don't know what they were
19 thinking. I'm allowed to show you what I think
20 they were thinking, and that is, they didn't
21 care. They had no regard for Mr. McCullough or
22 anyone else they sued. But you're allowed to
23 draw an inference about what it means to be
24 malicious. And that inference is that if the
25 defendant initiated the lawsuit without probable

1 cause then you can infer from that fact that it
2 was with malice. And that's what happened here.
3 No probable cause. No proof. No evidence.
4 Nothing. And they sued him.

5 Back to Number 23, please. Thank
6 you, Madam Clerk.

7 The justice proceeding terminated
8 favorably. When Mr. McCullough hired a lawyer,
9 Johnson Rodenburg went away, because they don't
10 like to deal with lawyers that are defending
11 cases that want to actually see evidence that
12 say, All right, Johnson Rodenburg, bring it on.
13 Let's bring it into court, see what your proof
14 is.

15 When that happens, they go away.
16 They like beating up on people like Timothy
17 McCollough, people without lawyers. They are
18 pretty good at beating people like Timothy
19 McCollough.

20 This case was dismissed with
21 prejudice. That was the best result I could
22 achieve for my client. The case went away
23 forever, and damages. And we will get to that.
24 Because the notion that this is like running a
25 stop sign and not hitting anyone and having a

1 close call is offensive, but we are going to get
2 to that.

3 So I submit, ladies and
4 gentlemen, you're going to be able to resolve
5 that malicious prosecution claim looking at the
6 laws we have just gone through.

7 Final cause of action that you
8 need to determine is what is called abuse of
9 process. Abuse of the legal process. What is
10 that?

11 Instruction Number 28, please.

12 An abuse of the legal process is
13 when someone has the ulterior purpose of
14 extracting money from someone they don't know.

15 Mr. McCullough didn't owe them
16 money. And let's cure that right now. What you
17 saw presented by Johnson Rodenburg is the way
18 that every time a debt collector gets called to
19 task for their illegal conduct, the case becomes
20 about what you owed the credit card. Isn't that
21 how we started this trial? "Who has a credit
22 card? Everyone makes their payments. What about
23 personal responsibility?"

24 That's not this case, ladies and
25 gentlemen. That case was across the street in

1 state court. Johnson Rodenburg lost that case
2 because they didn't have any evidence. You're
3 not that jury and don't fall into that trap.
4 There is a name for it, because debt collectors
5 use the defense that has been presented to you so
6 often when they get caught. It's called the
7 deadbeat defense. They say, Look at this guy.
8 He is a deadbeat. Is there any doubt in your
9 mind -- one of the things I hope you do when you
10 get back there, you will have the evidence. Look
11 at Exhibit 106. Look at all the people they sued
12 in Montana. Is there any doubt in your mind that
13 any one of those thousands of people, if they
14 stood up to Johnson Rodenburg the way Mr.
15 McCullough stood up to them, is there any doubt
16 in your mind you would have seen the exact same
17 defense?

18 Kerri Henan, who hasn't used the
19 credit card since she was divorced 16 years ago,
20 wouldn't she have been a deadbeat? Because, why
21 didn't you pay the credit card, ma'am? Everybody
22 owes their credit card, ma'am.

23 Ken Lucero, who came in.
24 Wouldn't he have been the deadbeat and wouldn't
25 they want to explore all the intricacies of his

1 background? Weren't they trying to do that
2 anyway, even though he is not the plaintiff in
3 this case?

4 It's called the deadbeat defense,
5 ladies and gentlemen. It's called the deadbeat
6 defense. And you're not that jury. You're the
7 jury that decides whether Johnson Rodenburg was
8 trying to extract money that Mr. McCullough
9 didn't owe.

10 He didn't owe. There is no
11 dispute about that. They already lost the case
12 once. The statute of limitations was up. The
13 judge has told you the statute of limitations was
14 up. He didn't owe the money. And yet they filed
15 it without a valid claim. Again, no evidence.
16 No investigation. No proof. That's abuse of
17 process, ladies and gentlemen.

18 So the judge said it was illegal.
19 You heard it was illegal. What else? They do it
20 all the time. All the time. You heard Mr.
21 Patten. He looked at their business model. He
22 looked at the way they operate. All the lawsuits
23 that they are able to produce with this
24 Collection Master software, with this team of
25 non-lawyers, he called them a factory; a factory

1 that produces lawsuits, a factory that sues
2 people and hales them into court and counts on
3 the fact that they won't respond or won't respond
4 with a lawyer. And they win. They win because
5 they are lawyers, not because they deserve to
6 win. And that's not fair.

7 You heard Ms. Lauinger. Nine out
8 of the 10 lawsuits they file are defaults. They
9 win just by filing the paperwork. They don't
10 even have to physically come into the courthouse.
11 They send it from North Dakota to all the 56
12 clerks of court in all the counties in Montana
13 and they sit back and wait 20 days and when the
14 20 days is up, judgement.

15 We know what they do when they
16 get a judgement. They convert this action that
17 could have been pennies on the dollar, pennies on
18 the dollar is how much these debt buyers pay for
19 these claims, and they turn it into a judgement
20 with all the interest, all the collection fees
21 and take that judgement and come after your bank
22 account, they come after your house, they come
23 after your property.

24 Of the one in 10 people who are
25 able to figure out how to respond to these

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1 lawsuits, not many of them have lawyers. Why is
2 that? Johnson Rodenburg knows it. You sue
3 someone for \$10,000 you get sued for \$10,000.
4 You start calling lawyers and the lawyers say,
5 yeah, I would love to represent you. I need a
6 \$20,000 retainer and I think you have a great
7 defense and we will get rolling. What is the
8 problem there? It doesn't make any sense and
9 they know it. It's their business model.

10 What else do we show you to show
11 you they do it all the time? Mr. Dendy said they
12 didn't have any less information here than they
13 usually do. Did he say this was a fluke? No.
14 He said they didn't do anything wrong. They did
15 not do anything wrong.

16 So it's a lucrative business.
17 You sue a hundred people. 95 of them you win.
18 You're not even up against the lawyer. The five
19 that show up and have a lawyer you just drop. No
20 harm, no foul. Sorry.

21 We brought you two other people
22 that have been sued by Johnson Rodenburg because
23 it was my intent, and I told you at the beginning
24 of the case, I was going to show you a pattern
25 and practice. This is a business-conduct case.

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1 This is putting this law firm and the way they
2 operate in Montana on trial. You're that jury.
3 You're that jury that scrutinizes the way that
4 Johnson Rodenburg conducts themselves in the
5 state of Montana.

6 I will leave for you what Ms.
7 Henan and Mr. Lucero said. Imagine their
8 circumstances. Imagine all the thousands of
9 people on Exhibit 106. They all have wives and
10 children and circumstances, and they get sued and
11 some of them can react better than others.

12 We brought you Mr. Eakin, another
13 highly ethical, fine, fine lawyer, a pillar of
14 this legal community. He comes into this
15 courtroom, with no compensation to himself, he's
16 not being paid. He has no interest in this case.
17 He walks you through Johnson Rodenburg's business
18 model. He knows it in helping all the people
19 making under \$10,000 a year that have been sued
20 by Johnson Rodenburg. And he tells you what they
21 did to Mr. McCullough is part of their business
22 practices.

23 So we showed you they do it all
24 the time. So what is left? Stop them. Right
25 here, today, stop them. You, ladies and

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1 gentlemen, you have the power and the obligation.
2 You're the conscience of this community. Today
3 you are the conscience of the state of Montana.
4 And you're going to decide today whether we
5 shelter companies like Johnson Rodenburg to
6 commit this type of unfair, deceptive, illegal
7 practice in our state. Do we let lawyers from
8 out of state come in and break our laws? You're
9 the only seven people who have the power to
10 decide that. You're the conscience of the state
11 of Montana today. Do we shelter this type of
12 conduct or do we punish it?

13 Let's talk about that a little
14 bit. Let's talk about personal responsibility.
15 Because isn't that what he wanted to talk about?
16 Isn't that what Johnson Rodenburg wanted to talk
17 about from the beginning of this case, from the
18 time we were selecting this jury? Personal
19 responsibility. "Everybody pays their credit
20 cards."

21 What about Mr. McCullough? Is he
22 a deadbeat? He had a brain injury. He had some
23 problems. He lost his job. He was out of work.
24 He is trying to get his disability. He gets
25 behind on his credit cards. He gets approved for

1 disability. He finds out that he can tell all
2 those credit card companies, ha-ha. I don't owe
3 you anymore because you can't collect from me
4 because Social Security benefits are not
5 collectable.

6 What does he do? He pays anyway.
7 He works out deals with the credit card companies
8 that will work with him, and there is one that
9 won't work with him and he doesn't have the money
10 to write them a check and make them go away. And
11 they keep calling and calling and harassing him
12 and saying nasty things to him. They curse at
13 him. At some point he is more mad than wanting
14 to pay back a debt collector that he doesn't
15 know, and he is mad at them. He tells them to
16 pound sand.

17 What else about personal
18 responsibility? What about corporate
19 responsibility? What about responsibility from
20 this law firm after a federal judge in Montana
21 said, You broke the law, for them to come into
22 this courtroom and, as their defense, smile at
23 you, ladies and gentlemen, and tell you they
24 didn't do anything wrong?

25 THE COURT: Five minutes,

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1 Counsel.

2 MR. HEENAN: Thank you, Your
3 Honor.

4 In this courtroom, in this very
5 courtroom in criminal cases, under the federal
6 criminal laws, defendants who don't accept
7 responsibility for their conduct automatically
8 get more jail time because it's --

9 MR. SIMPSON: Your Honor, I
10 object. This is not a criminal proceeding. I
11 object.

12 THE COURT: Sustained.

13 MR. HEENAN: So how do we stop
14 them?

15 Exhibit 32, please.

16 One of the damages Mr.
17 McCullough's claiming and you, ladies and
18 gentlemen, need to decide is his personal
19 humiliation, his embarrassment, his mental
20 anguish, his emotional distress. And the judge
21 has told you there is no fixed standard. There
22 is no measure in this case. There is not a
23 formula.

24 But let me suggest to you a
25 formula. And it's just my suggestion to you. We

1 started this trial with Johnson Rodenburg's
2 lawyers saying Johnson Rodenburg doesn't take
3 very kindly to being a defendant in a lawsuit.
4 They don't like it very much. They are not here
5 by choice. That's what we were told. They don't
6 like it.

7 You know what? If Johnson
8 Rodenburg was on the wrong end of a frivolous
9 lawsuit, do you think they would be coming in
10 saying no harm, no foul, it's just like running a
11 traffic light and not hitting anyone? I suggest
12 to you that that would not at all be what Johnson
13 Rodenburg would be saying if they were on the
14 other side of a frivolous lawsuit.

15 So if they were on the wrong side
16 of a frivolous lawsuit, what would we say? We
17 would say, that's too bad. No one should have to
18 be the victim of a frivolous lawsuit. But you're
19 lawyers. You're a law firm. You know how to
20 respond. So they would be about here.

21 What about someone who is not a
22 lawyer? What about someone who gets sued, they
23 have the financial means? They are not a lawyer,
24 they have to go hire a lawyer, they have to pony
25 up the \$20,000 to retain a lawyer. It's

1 frustrating to them to be sued. It's frustrating
2 to them to be on the wrong side of a frivolous
3 lawsuit. They are mad. They would be about
4 here, maybe here.

5 What about someone that is sued
6 frivolously, sued maliciously and they don't have
7 any money? They are one of Mr. Eakin's clients
8 who goes to Legal Services or can get into Legal
9 Services. They are sued, they know it's
10 frivolous, but they are not a lawyer and don't
11 know how to respond. They don't know what to do
12 about it and they can't get help. Where are
13 they? They are about here. That's really
14 stressful. It's stressful to be the victim of a
15 frivolous lawsuit and not know what to do about
16 it and not know how to protect yourself.

17 Where is Mr. McCullough? Mr.
18 McCullough's up here. You heard it. He has a
19 mental condition. He has all these problems.
20 They are not in dispute. He has this preexisting
21 stress that he can't work, he can't be a
22 dishwasher. He can't be a janitor. That's how
23 bad his mental condition is. Timothy McCollough
24 stays at home all day and feeds his chickens and
25 feeds his turkeys and never leaves his house. He

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1 lives in a little house out by the railroad
2 tracks out in Laurel, Montana. He told you this.
3 It's not in dispute. He is not a normal,
4 mentally healthy person. So the way he copes
5 is he isolates himself.

6 So how does Tim react when he
7 gets hit with a second lawsuit after he thought
8 the thing had gone away? He is up here.

9 So what does that mean?

10 Madam Clerk, if I could have up
11 the questionnaire.

12 I'm going to suggest to you,
13 ladies and gentlemen, Tim's a million dollars.
14 He is a million dollars. And you can decide and
15 it's your job to decide whether or not that's
16 more or less; the frustration, the anger, the
17 migraines, the insults, the being called a liar,
18 how much that is worth. But it's worth
19 something. It's worth a lot of something and I'm
20 suggesting to you it's a million dollars because
21 he is this high.

22 And I don't know where the other
23 people on that Exhibit 106 fit in. We don't know
24 their circumstances. But I don't think there is
25 anyone on that list of the thousands of people

1 that could have been more defenseless, more
2 helpless to being attacked and prosecuted in a
3 lawsuit that was frivolous.

4 Could I have the questionnaire?

5 THE COURT: The Special Verdict
6 Form?

7 MR. HEENAN: The Special Verdict
8 Form.

9 THE COURT: That's 30 minutes,
10 Counsel.

11 MR. HEENAN: Am I allowed to go
12 over and take out of my rebuttal?

13 THE COURT: You are.

14 MR. HEENAN: I sure appreciate
15 Your Honor keeping me on task.

16 Question 1, did Johnson Rodenburg
17 violate the Unfair Trade Practices act? Yes.

18 Page two, please.

19 Did Johnson Rodenburg maliciously
20 prosecute the debt-collection lawsuit against
21 Timothy McCollough? Yes.

22 Did Johnson Rodenburg abuse the
23 legal process in the debt-collection lawsuit
24 against Tim McCullough? Yes.

25 What amount of damages do you

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1 find?

2 Slide that up, please, Madam
3 Clerk.

4 A million dollars, ladies and
5 gentlemen. That's my suggestion to you. And,
6 again, it's totally up to you. That's my
7 suggestion as a lawyer. It's not the evidence.
8 You decide the evidence. You decide whether it's
9 more or less. It's up to you. But that's my
10 suggestion to you.

11 We don't have a lot of time to
12 cover. The violation of the Fair Debt Collection
13 Practices Act, per Congress, they built in a
14 statutory damage. It can be between one dollar
15 and a thousand dollars. I'm going to suggest a
16 thousand dollars. But, again, that's up to you.

17 Next page, please.

18 Punitive damages, yes. The judge
19 decided in this case you can decide whether
20 Johnson Rodenburg should pay punitive damages.
21 Again, ladies and gentlemen, you're the
22 conscience of this community. Do we shelter and
23 protect law firms that come into our state and
24 break the law or do we punish them? That's for
25 you to decide today.

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1 Finally, ladies and gentlemen, I
2 want to show you Instruction Number 16, because I
3 think this is important. The judge is going to
4 instruct you that you decide this case based on
5 the evidence. You don't decide it based on
6 sympathy. I'm sure Mr. Dendy is a very fine man
7 who has a very nice wife and very nice kids. But
8 it has nothing to do with this case. Mr. Dendy
9 is not a defendant in this case. Johnson
10 Rodenburg's trying to appeal to your sympathy by
11 putting Mr. Dendy up as the defendant. He is not
12 the defendant on trial.

13 Johnson, Rodenburg & Lauinger, a
14 legal entity, a legal partnership from North
15 Dakota, is on trial. They try to appeal to your
16 sympathy when they have Mr. Dendy smile and tell
17 you he is a good father. I'm sure he is. But it
18 doesn't make it okay to sue people without
19 evidence. And we showed you the evidence.

20 Same with Mrs. Lauinger. I'm
21 sure she is a very fine person. I have no
22 quibbles with Ms. Lauinger, nor does my client.
23 Ms. Lauinger is not on trial. She is sitting at
24 counsel table because a corporation, a
25 partnership in this case, has a right to put a

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1 human face on a legal entity. They have chosen
2 Ms. Lauinger to be the face of that entity. She
3 is not the defendant in this case. Johnson,
4 Rodenburg & Lauinger is the defendant. So don't
5 consider the sympathy. Don't consider whether
6 Mr. Dendy is probably a nice guy, Ms. Lauinger is
7 probably a nice woman. Consider whether there's
8 an out-of-state law firm breaking the law, based
9 on the evidence you've heard.

10 Thank you, ladies and gentlemen.

11 THE COURT: You may close for the
12 defendant, Mr. Simpson.

13 MR. SIMPSON: Thank you, Your
14 Honor.

15 Good morning. Well, the judge
16 has given me 45 minutes to make my closing
17 argument this morning, and I think you will be
18 happy to know I don't intend to take all of that.
19 I kind of wish the Courts would give jurors an
20 electric buzzer so when the lawyers speak too
21 long, the jurors can start pushing the buzzer to
22 tell the lawyer to shut up and sit down. But I
23 will do my best not to put you in that position.

24 Mr. McCullough didn't pay his
25 credit card. We all know that. He doesn't

1 dispute it. He owed it. There is no dispute.
2 The money was green when he spent it. He didn't
3 pay it back.

4 My client is not responsible for
5 that. If Mr. McCullough paid his credit card
6 bill to Chase Manhattan, we wouldn't be here this
7 morning. We wouldn't have been here this week.
8 He got out of paying his bill and now he wants
9 you to award him for it. I think I just heard
10 his counsel ask you to give him \$1,001,000. That
11 just strikes me as incredible. He didn't pay his
12 bill and now he wants you to reward him. Don't
13 do it.

14 You heard a lot of testimony
15 about what my client did or does as a general
16 business practice. You didn't hear a lot of
17 testimony about what happened in particular in
18 Mr. McCullough's case because it's not that
19 appealing. You heard about different cases, from
20 Ms. Henan, Mr. Lucero. That's not this case.
21 That's another case.

22 You heard about other lawsuits my
23 client files. Why did you hear that? You heard
24 it to distract you from the evidence in this
25 case. The evidence isn't that favorable to Mr.

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1 McCullough. Again, he didn't pay his bill and
2 now he wants you to reward him for it.

3 You heard a lot about what my
4 client does to obtain a judgement. Well, you
5 know in this case my client never got a judgement
6 against Mr. McCullough. You heard all the
7 horrible things that can happen to a person after
8 a judgement is entered. You can garnish the
9 wages, get a lien on the real estate, take
10 people's money from a bank account. That's true.
11 That's what the court system and the laws of this
12 country authorize.

13 Did any of those things happen
14 here? No. Didn't happen to Mr. McCullough. Ask
15 yourself why you're hearing about that over the
16 last couple days. It's to distract you from what
17 happened here. And that's nothing.

18 In fact, I think I heard Mr.
19 Heenan say in his closing argument that you're
20 hearing about these other lawsuits that my client
21 filed and that's why they are on trial. It's not
22 about what happened to Mr. McCullough. They are
23 trying to make this about other people; other
24 people that aren't here before you today; other
25 people that aren't making claims.

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1 And let's talk about this tactic
2 a little further. What about the thing about the
3 requests for admission and my client not
4 including some magical language in the requests
5 that said, well, if you don't answer in 30 days,
6 they might be deemed admitted. They will be
7 deemed admitted. We know that Mr. Heenan, when
8 he sent them to my client in this case, didn't
9 include that same language.

10 And in fact, Madam Clerk, would
11 you bring up Instruction Number 29, please.

12 The Court's going to instruct
13 you, this is the law in Montana. The Montana
14 Rules of Civil Procedure do not state that a
15 party who serves requests for admission must tell
16 the opposing party of the effect of the failure
17 to respond to the request in a timely manner.
18 That means my client didn't need to put this
19 magical 30-day language in the requests. Montana
20 law says that what they did was okay.

21 It's a red herring, ladies and
22 gentlemen. Mr. Heenan didn't do it. My client
23 didn't do it. I will submit to you a lot of
24 lawyers in this state don't do it, and that's
25 because the rules don't require it.

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1 I want to talk a little bit about
2 Mr. Patten's testimony. He sat there and told
3 you that it was really important, lawyers are
4 required to diligently represent their clients
5 and they are required to make a diligent
6 investigation before they file a lawsuit.

7 He was under an obligation,
8 before he came in and testified under oath and
9 offered you his expert opinion, to make a
10 diligent investigation as well. But did he? I
11 will submit to you that he didn't. He didn't
12 remember whether my client had ever deemed the
13 requests for admission admitted, and he thought
14 my client had filed a motion for summary
15 judgement against Mr. McCullough. He didn't do
16 an investigation, but he sat here and told you
17 that my client was wrong for not doing one in
18 this case.

19 Well, I tell you, I don't think
20 Mr. Patten was being dishonest. I think he made
21 a mistake. If he looked at the file, he would
22 have known better.

23 He also came in here and
24 criticized my client for filing a lawsuit beyond
25 the statute of limitations. But do you remember,

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1 on cross-examination, what did he say? He had to
2 admit, Oh, yeah, I filed a lawsuit that was
3 beyond the statute of limitations on behalf of my
4 own law firm. It can happen to any lawyer in the
5 state.

6 I want you to ask yourself, when
7 you're deliberating, who is really at fault here,
8 if it's not Mr. McCullough in the first place for
9 not paying his bill. I will tell you it's CACV.
10 And ask yourself why isn't CACV here in the
11 trial. They are not here to answer for their
12 mistakes and there is no question that they made
13 the pivotal mistake that led to this mess.

14 Could you pull up Exhibit 501,
15 please.

16 Here it is. You've seen this
17 letter before. This is the January 4, 2000
18 letter that I told you about before, in the
19 opening statement. If this doesn't demonstrate a
20 reasonable investigation, I'm sorry, but I don't
21 know what does. This is a letter from my client,
22 Johnson, Rodenburg & Lauinger, and they are
23 writing to their client and they say, You know
24 what? We picked up a problem with the statute of
25 limitations.

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1 They are doing what they are
2 supposed to be doing. They went to their client,
3 as any other lawyer does, and they said, What is
4 going on? Give us something on this.

5 Could you pull up 502, please.

6 Here it is. Here is an e-mail
7 from their client in response to Grace's letter.
8 What do they say? They say he made a payment
9 within five years. He made a payment on June 30,
10 2004 and that was a check for \$75.

11 Can you move to Exhibit 7-2,
12 please.

13 Here it is. Here's a note in the
14 file. This is a note entered by the people at
15 CACV, e-mailed to Lisa, statute of limitations
16 not expired due to postdated check that was made
17 to us at CACV. Please continue suit.

18 Well, my client has two pieces of
19 written material from their client saying, no, we
20 made a mistake when we sent you a file
21 originally. There was a payment in 2004. There
22 was a payment within five years. Go ahead and
23 file suit, please.

24 That's a reasonable
25 investigation, ladies and gentlemen. But, again,

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1 ask yourselves, where is CACV? They ought to be
2 here answering for their mistake.

3 I'm going to go through the jury
4 instructions with you in a little bit, but I want
5 to talk, first, about the damages in this case.
6 I think one of the glaring omissions in this case
7 and maybe the biggest reason you heard from the
8 plaintiff about the other cases, the other cases
9 that aren't really here, Ms. Henan and Mr. Lucero
10 and the other lawsuits against people you haven't
11 heard from, one of the reasons you heard about
12 that is there a complete lack of evidence that
13 Mr. McCullough sustained any damage by reason of
14 the fact that he was a defendant in a lawsuit.
15 You didn't hear that he spent a single dime, not
16 one dollar in what lawyers like to call special
17 damages or hard damages or out-of-pocket costs.
18 Not one red cent. But you've been asked by him
19 to give him a million dollars.

20 Of course, since you didn't hear
21 any evidence about special damages or
22 out-of-pocket costs, he had to turn to something
23 else. What does he turn to? He turns to
24 emotional distress. The only testimony you heard
25 on his emotional distress was that he had a

1 migraine a few days after the accident and then
2 it made him angry.

3 I don't want to make light of Mr.
4 McCullough's situation, because he has had an
5 unfortunate life over the last 15, 20 years.
6 That's not why we are here. That's not what this
7 case is about. But I want you to consider his
8 claim for emotional distress and for a million
9 dollars in light of the evidence that you did
10 hear.

11 You heard from Mr. McCullough
12 that he has had a headache virtually every single
13 day since 1990. My client didn't cause that.
14 That's nothing new. That's something that's been
15 ongoing for the last 19 years, and unfortunately
16 is probably likely to be ongoing for a long time
17 for Mr. McCullough. And my client is not
18 responsible for that.

19 You heard about his anger issues.
20 You heard that he was angry after this lawsuit.
21 But you also heard that he had been angry, he had
22 been so angry after his head injury in the 1990s
23 that, what did he do? He made threats to
24 coworkers and was determined to be such a danger
25 to his coworkers that he was disabled.

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1 I will submit to you that the
2 anger and the headaches are nothing new. They
3 are the same thing that's been going on for Mr.
4 McCullough since 1990. Unfortunate? Yes. Is my
5 client responsible for it? No.

6 What else did Mr. McCullough tell
7 you? He told you he didn't go to any doctors and
8 he didn't go to any psychologists to treat his
9 emotional distress. I submit if it was real
10 serious or severe emotional distress he would
11 have done so. He got treatment back in the
12 nineties after his head injury and he was
13 definitely in distress because of whatever was
14 going on with him at the time. He saw other
15 psychiatrists.

16 He didn't do that in this case.
17 He hasn't proved to you that he has serious or
18 severe emotional distress. He also told you not
19 only did he not see any doctor, he couldn't
20 recall if it even altered his daily routine.

21 I also want you to consider his
22 emotional distress claim in light of the
23 testimony of Dr. Veraldi. Dr. Veraldi was his
24 own paid expert that came in and testified. And
25 as kind of a side note, I told you at the

1 beginning I was planning on calling Dr.
2 McElhinney, but after we heard Dr. Veraldi
3 yesterday, we made the decision, you know what?
4 We don't want to waste your time with redundant
5 or duplicative testimony.

6 You heard from Dr. Veraldi. And
7 what did she say? She said, first of all, she
8 said financial pressures in lawsuits cause
9 anybody stress. Is that a surprise? I don't
10 think so. We all know that.

11 But she couldn't tell you that
12 his diagnosis today is any different than it was
13 the day before the lawsuit. She told you that
14 every single condition she diagnosed in him
15 preexisted the lawsuit, that is significant, with
16 nothing new going on. This is the same pattern,
17 unfortunately, that Mr. McCullough has been in
18 since 1990.

19 What else did she tell you? I
20 think this is important to keep in mind when you
21 consider what you're being asked to do in this
22 case. She told you that she can't rely on the
23 statements that Mr. McCullough was making to her.
24 That's significant. She's his paid expert and
25 she's telling you, "I didn't rely on what he is

1 telling me."

2 I will submit, if his own paid
3 expert can't rely on what he's telling her, you
4 can't rely on him either. I'm not saying that
5 because I think Mr. McCullough is dishonest. I
6 don't. But I think he has conditions that
7 prevent him from accurately reporting what is
8 going on with him. Because of those conditions,
9 you simply can't believe what he is telling you.

10 Do I have about 10 minutes?

11 THE COURT: No, you have about
12 15.

13 MR. SIMPSON: Could you pull up
14 the first page of the verdict form, please.

15 THE COURT: Actually, Counsel,
16 you have more than 15.

17 MR. SIMPSON: Before we get to
18 the questions, one of the instructions, and I
19 don't have it in front of me, one of the
20 instructions the Court will give you in a few
21 minutes says that your answers to each of the
22 questions on the verdict form must be unanimous.
23 You all have to agree on every single question.

24 One of the other instructions is
25 going to say you individually need to consider

1 the evidence as you viewed it and you shouldn't
2 change your opinion just because somebody else
3 wants you to do so. You have to live with the
4 verdict you're reaching so make sure it's based
5 on how you feel about this case, not how the rest
6 of the jurors do. It has to be unanimous.

7 Question 1, Did Johnson,
8 Rodenburg & Lauinger violate the Montana Unfair
9 Trade Practices Act? I'm going to tell you you
10 want you to check No, but let's look at the
11 instructions on that.

12 Could you bring up Instruction
13 22.

14 Numbers 1, 2 and 3, those are the
15 elements. Those are the things you have to find
16 before you check Yes to answer Question Number 1.
17 I will submit to you that the plaintiff can't
18 satisfy any of those elements. He hasn't shown
19 that Johnson, Rodenburg & Lauinger did anything
20 that was unfair or deceptive in a trade or
21 commerce.

22 In the first place, my client is
23 a law firm. They are not engaged in a trade or
24 commerce as those terms are used. They are
25 engaged in a professional practice of law. It's

1 not a trade or commerce. More importantly, even
2 if you thought it was, it's not unfair or
3 deceptive what they did. They utilized the court
4 system. That's the way this country works. The
5 court system, to represent a client and pursue a
6 debt that was owed. That is not an unfair or
7 deceptive practice.

8 I've already talked about the
9 damages aspect that is covered in two and three,
10 so I'm not going to go back and rehash that here.
11 I will submit to you again, briefly, that I don't
12 think the plaintiff has shown any damages in this
13 case. My client's conduct didn't cause him any
14 damage.

15 Could you move to the second page
16 of the verdict form, please.

17 Question 2, Did Johnson,
18 Rodenburg & Lauinger maliciously prosecute the
19 debt-collection lawsuit against Timothy
20 McCollough? Again, I think you're going to
21 answer no when you get to that point, but let's
22 look at the jury instruction on this.

23 Please pull up Number 23.

24 Mr. Heenan briefly touched on
25 this instruction during his closing argument, and

1 I think we can agree the areas of dispute are
2 primarily Number 3, Number 4 and Number 6.

3 Numbers 1 and 2, we contest that. My client
4 instituted a lawsuit on behalf of its client.

5 Let's look at Number 3. The
6 defendant acted without probable cause. And
7 there's an instruction on that.

8 Can you pull up 24, please.

9 THE COURT: I've got it.

10 MR. SIMPSON: Thank you, Your
11 Honor.

12 Here's what probable cause is:
13 One who takes an active part in the initiation or
14 continuation of civil proceedings against another
15 has probable cause for doing so if he reasonably
16 believes in the existence of facts upon which the
17 claim is based, and correctly or reasonably
18 believes under those facts the claim may be valid
19 under the applicable law.

20 What do we have in this case? My
21 client is a law firm. It's representing its
22 client on a credit card debt that has
23 indisputably not been paid. I will submit to you
24 that is a claim that may be valid under the
25 applicable law of Montana. We all know that.

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1 There's no secret to that.

2 Do we reasonably believe in the
3 facts upon which the claim was based? Sure.
4 There is nothing suggesting otherwise. They got
5 the information from their client that said, hey,
6 we bought the debt. Mr. McCullough doesn't
7 dispute there was a debt. He reasonably believed
8 it.

9 And if the statute of limitations
10 is an issue for somebody, you've seen the letter.
11 You've seen the e-mail. You've seen the entry in
12 the electronic file that says, We made a mistake
13 when we initially sent you the file. The correct
14 date is June 30, 2004.

15 That is certainly grounds for my
16 client to reasonably believe it has a basis to
17 file a lawsuit.

18 Could you go back to 22, please.
19 I'm sorry. 23. I'm sorry.

20 I'm sorry for jumping around with
21 these instructions, but just given the way they
22 are set forth, it's kind of necessary.

23 The other main one that we have a
24 dispute with is Number 4, that the defendant was
25 actuated by malice. Let's look at the Court's

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1 instruction on malice.

2 That's Number 26, please.

3 This is the Court's Instruction
4 Number 26. For purposes of a malicious
5 prosecution claim, the terms malice and malicious
6 mean either a wish to vex, annoy or injure
7 another person or an intent to do a wrongful act
8 established by proof or presumption of law.

9 Let's talk about that for a
10 minute. Did you hear any proof that Charlie or
11 Lisa or anyone else at Johnson Rodenburg wished
12 to vex, annoy or injure Mr. McCullough? No. The
13 unrefuted testimony on this point from Mr. Dendy
14 is that he filed the lawsuit on behalf of his
15 client because he thought there was an unpaid
16 credit card debt. He was pursuing a legal
17 avenue, a legal recourse, for his client to try
18 to get that debt paid. That's not a wish to vex,
19 injure or annoy someone. That's an attempt to
20 represent a client and get a debt paid.

21 Let's look at part two. The
22 defendant has knowledge of facts or intentionally
23 disregards facts that create a high probability
24 of injury to the plaintiff, and deliberately
25 proceeds to act with indifference to the high

1 probability of injury to the plaintiff.

2 I can't think of a certain fact
3 that Charlie knew of or intentionally disregarded
4 that created a high probability of injury to Mr.
5 McCullough. He knew there was a credit card
6 debt. He didn't know, turns out in the long run,
7 he didn't know the right date about the statute
8 of limitations. But the only date that he did
9 know that was, to him, correct at the time was
10 this June 30, 2004 date.

11 He didn't deliberately proceed to
12 act with an indifference to the high probability
13 of injury to the plaintiff. He proceeded to act
14 as a lawyer does when a client asks a lawyer to
15 represent him or her. He got the information he
16 needed. He asked Mr. McCullough through a
17 letter, Hey, do you dispute this debt? Mr.
18 McCullough didn't respond. Maybe that would have
19 nipped it in the bud, but he didn't call. He
20 didn't write. My client utilized the court
21 system to try to get the debt paid, and that is
22 not a malicious act.

23 Could you bring up 25, please.

24 Just one other on the malicious
25 prosecution and then we will move on, because I

1 know you're getting tired of it.

2 The fact that a lawsuit ends in
3 favor to a defendant, in this case Mr.
4 McCullough, does not prove that the plaintiff
5 lacked probable cause to bring the lawsuit.

6 Keep that in mind. The fact that
7 my client ultimately dismissed at the request of
8 its client, the fact that it ultimately dismissed
9 that lawsuit, doesn't mean that they lacked
10 probable cause to file it in the first place.

11 Could you go back to the verdict
12 form, please.

13 Number 3, Did Johnson, Rodenburg
14 & Lauinger abuse the legal process in the
15 debt-collection lawsuit against Tim McCullough?
16 I'm going to ask you to check the box No. I think
17 that's the only rational decision based on the
18 proof before you.

19 Again, I'm going to take a quick
20 look at the jury instructions.

21 Number 28, please. Can I have
22 that?

23 It says, Defendant is liable for
24 abuse of process if the plaintiff can prove that
25 my client, first, had an ulterior purpose of

1 extracting money from the plaintiff that he did
2 not owe. That's the crucial part, that he did
3 not owe. You heard it. He admitted he incurred
4 the bill and he didn't pay it. Under any common
5 sense definition, he owed the money. My client
6 wasn't suing to extract something they thought he
7 didn't owe. He owed the money and he couldn't
8 pay it. He didn't pay it.

9 My client was following the legal
10 process. It was using the court system in the
11 way it was intended to be used, by filing a
12 lawsuit against him. That's how we resolve
13 disputes in our society, by filing lawsuits.

14 There's been some implication
15 that it's inappropriate for my client to seek
16 relief from the Court. You've heard about all
17 the other lawsuits, but you know what? It's
18 legal to file a lawsuit. That's how this society
19 works. When we have disputes, we don't go beat
20 each other up. We come to court and ask the
21 Court for relief.

22 My client gets a default
23 judgement against somebody in the other case.
24 That's because the other side didn't play and the
25 judge said, you know what? You didn't show up.

1 Well, the plaintiff is entitled to a default
2 judgement. That's how the system works. My
3 client shouldn't be penalized for using the court
4 system.

5 Number 2, this element isn't a
6 lot different than Number 1. Defendant willfully
7 filed a debt-collection action without a valid
8 claim. I tell you what. It was a valid claim.
9 He didn't pay it. We know that.

10 Number 3, we have already talked
11 about the damages. There aren't any damages here
12 and my client didn't cause anything to happen.
13 No damages.

14 Could you go back to the second
15 page of the verdict form, please. Slide that up
16 so they can see Question 4. The wonders of
17 technology.

18 I will tell you what it says, you
19 can see the top part. The only part we are
20 missing is Part B, and that's a line that says
21 Fair Debt Collection Practices Act Statutory
22 Damages.

23 One very minor point. I don't
24 know if you think it's minor or not. My client
25 doesn't think it's minor. Mr. Heenan told you in

1 his closing that you can award from one dollar to
2 \$1,000. You can award zero. You don't have to
3 put anything under the second part of this for
4 Fair Debt Collection Practices Act. The judge
5 has not said you have to give Mr. McCullough a
6 single dime.

7 I've already talked about the
8 emotional distress. I don't think he's proved
9 it. If you're going to give him anything, keep
10 in mind what he got out of paying in the first
11 place, and then put that in relationship to what
12 he wants you to give him in this case.

13 My client sued him. He had about
14 an eight or \$9,000 credit card debt, including
15 interest. My math is not that good, but he is
16 asking for a million bucks. How many times 9,000
17 is that? That's crazy. If you're going to give
18 him anything, I will submit to you in the range
19 of 500 bucks. Anything else is simply a windfall
20 and not justified.

21 Stand back, take a look at this
22 case through the lens of common sense. Somebody
23 doesn't pay their bill, they get mad that they
24 get sued over it, they sue somebody and they want
25 a million bucks. Doesn't make sense.

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1 Could you turn to the next page
2 of the verdict form, please. Thank you.

3 Please continue to Question 5
4 only if you answered Yes to Questions 1, 2 or 3,
5 and you found damages under Question 4-A.
6 Otherwise skip Number 5, sign and date the
7 verdict form and return it to the bailiff.

8 If you answered Questions 1, 2
9 and 3 No, and you didn't give Mr. McCullough any
10 damages for emotional distress, you do not even
11 get to Question Number 5. You don't get there.

12 I don't think you're going to get
13 there. At all. Punitive damages are not
14 justified in this case. There is not one iota of
15 proof that my client should be punished.

16 But let's look at the jury
17 instructions and see if we get a sense of that.

18 Before we get there, what is the
19 question? Do you find by clear and convincing
20 evidence that punitive damages should be awarded
21 against Johnson, Rodenburg & Lauinger? The
22 obvious question is no, but let's look if we
23 could, please, at the damages on the punitive
24 damages instruction. I'm going to have to dig
25 that out here.

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1 Number 37, if you have that
2 available. Thank you.

3 Plaintiff asks for punitive
4 damages which may be allowed by you provided you
5 first find that the plaintiff has suffered actual
6 damages. We already talked about the actual
7 damages. In the first place, he doesn't have a
8 single dime in out-of-pocket damages. The other
9 damages we talked about is emotional distress,
10 which isn't there. Even if you conclude he
11 suffered some actual damages, he still has to
12 show injury through malice of another.

13 Malice. That's the point here,
14 malice. We have already talked a little bit
15 about malice when we talked about malicious
16 prosecution. But there is a difference in the
17 instructions as to malice. You heard one
18 definition of malice when we talked about
19 malicious prosecution. Do you remember that?
20 One of the parts was a wish to vex, injure or
21 annoy another person, and the other instruction
22 or the other part of that instruction went to a
23 deliberate indifference of injury or a high
24 probability of injury to the plaintiff. And
25 that's actually similar to what is set forth in

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1 Number 39.

2 Punitive damage cases, if you're
3 going to consider the question of malice, I don't
4 think you're going to get there, but if you do
5 get to answer Question 5, this is what the
6 plaintiff has to show. He has the burden of
7 proof on this issue. They have to show -- this
8 is what you have to answer -- did Charlie or Lisa
9 deliberately proceed to act in conscious or
10 intentional disregard of the high probability of
11 injury to Mr. McCullough? No. Did they
12 deliberately proceed to act with indifference to
13 the high probability of injury to the plaintiff?
14 No.

15 You've seen the evidence. You've
16 heard it. I said it about 16 times up here and I
17 won't belabor it. My client has a client. It's
18 representing its client. Its client gives my
19 client, Lisa and Charlie, bad information. They
20 act on that information and they filed a lawsuit.
21 That is not malice. My client made a mistake.
22 They made a mistake. There is no question about
23 it, but they didn't act with malice. There is
24 simply nothing to justify this.

25 I have little question you're

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1 going to answer No on Number 5. There is one
2 other point on this.

3 If you could please bring up
4 Number 38.

5 Consider the proof with respect
6 to the question of malice through the lens of
7 Number 38. He's got to prove all the elements of
8 that claim by clear and convincing evidence.
9 What does that mean? Evidence in which there is
10 no serious or substantial doubt about the
11 correctness of the conclusions drawn from the
12 evidence.

13 No serious or substantial doubt.
14 Well, there is plenty of doubt here. There is
15 plenty of doubt. My client's representing its
16 client. My client is doing his job as a lawyer.
17 He's acting in good faith on the representations
18 made by his client. Clear and convincing, that's
19 a pretty high standard to get to. Plaintiff
20 hasn't achieved it.

21 I'm going to conclude now. I
22 appreciate your time. I know we all have things
23 we would rather be doing, but your job here is a
24 very important part of the legal system. My
25 client and I appreciate your time. I know you

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1 will reach the right decision. Thank you.

2 THE COURT: Mr. Heenan?

3 MR. HEENAN: Thank you, Your
4 Honor.

5 Ladies and gentlemen, we don't
6 use the Montana court system to resolve disputes.
7 We use the Montana court system to resolve
8 legitimate disputes, not frivolous ones. Lawyers
9 need to have evidence. When lawyers don't have
10 evidence and they sue you anyway, they are filing
11 frivolous lawsuits.

12 And that's what you've seen here.
13 A business that comes into our state and, as a
14 practice, files frivolous lawsuits and makes a
15 lot of money filing frivolous lawsuits.

16 Instruction Number 33, please.

17 This is the law that the judge
18 has given you with respect to my client's
19 damages. This is the instruction that you need
20 to follow. You will follow what the judge is
21 telling you the law is. Here is the law in
22 Montana.

23 What is mental and emotional
24 suffering? That is lawyer talk. But what are we
25 talking about? We are talking about grief,

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1 shame, humiliation, embarrassment, anger,
2 chagrin, disappointment, worry and nausea. We
3 know what those words mean.

4 How do we put a dollar value to
5 things like anger? Well, the judge is telling
6 you. There is no definite standard. There is no
7 requirement that any witness come in here and
8 offer an opinion about what the appropriate
9 measure of that damage is. That would be
10 invading your province. It would be invading
11 what your task is, ladies and gentlemen, to set
12 the measure of those damages.

13 I made a suggestion to you.
14 Johnson Rodenburg has made a suggestion to you.
15 But you decide, not me, not Johnson Rodenburg.
16 You, ladies and gentlemen, decide.

17 What else is the judge telling
18 you? Exercise calm and reasonable judgement.
19 Consider the evidence. Don't rely on sympathy.
20 Consider the evidence that you saw. And she is
21 telling you that the compensation must be just
22 and reasonable. That's what you're here for,
23 ladies and gentlemen, to do justice. You're
24 going to do justice today.

25 What we can be certain of is when

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1 you're done rendering your verdict, Ms. Lauinger
2 and Mr. Dendy are going to return back to their
3 office in North Dakota. And we can assume that
4 there's going to be a big stack of lawsuits
5 waiting for them to sign so they can file and sue
6 the next people all over this state and others.

7 But what happens from there,
8 ladies and gentlemen? What happens to that stack
9 of lawsuits? You are going to decide. You, by
10 your verdict today, decide what happens with that
11 stack of lawsuits. You decide whether it's
12 business as usual and sign and sign and file and
13 file, and we don't need evidence and we will get
14 it later if they have a lawyer.

15 Or there's something else you can
16 do today. That when they get back and see the
17 stack of Complaints to sign, they can put the
18 brakes on. By your verdict, they will put the
19 brakes on and they are going to say, Wait a
20 minute. In Montana, that jury in Montana said we
21 need evidence before we sue people in Montana.
22 Make some calls, do what we have to do, but let's
23 get the documents in our file before we sue the
24 people. I'm not signing the Complaint until I
25 have the documents because that's the law in

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1 Montana. And you, by your verdict, ladies and
2 gentlemen, can send that message.

3 When someone says to you, why did
4 you award what you awarded? You can say, Because
5 we made a law firm act like lawyers. We told a
6 law firm, If you're going to practice in our
7 state, you're going to act like lawyers.

8 On behalf of Mr. McCullough and
9 myself, I very much appreciate your time. Thank
10 you.

11 THE COURT: Members of the jury,
12 now that you've heard all the evidence and the
13 arguments of the attorneys, it's my duty to
14 instruct you on the law that applies to the case.
15 A copy of these instructions will be available in
16 the jury room for you to consult if you find it
17 necessary.

18 It is your duty to find the facts
19 from all the evidence in this case. To those
20 facts you will apply the law as I give it to you.
21 You must follow the law as I give it to you
22 whether you agree with it or not. You must not
23 be influenced by any personal likes or dislikes,
24 prejudice, sympathy. That means you must decide
25 the case solely on the evidence before you. You

1 will recall that you took an oath promising to do
2 this at the beginning of the case.

3 In following my instructions, you
4 must follow all of them and not single out some
5 and ignore others. All are equally important.
6 You must not read into these instructions or into
7 anything the Court may have done or said any
8 suggestion as to what your verdict should be.
9 That's a matter entirely up to you.

10 In a civil case such as this one,
11 the party that makes a claim must prove the claim
12 by the greater weight of the evidence, sometimes
13 referred to as the preponderance of evidence.
14 This is called burden of proof. A party who has
15 the burden of proof must persuade you by the
16 evidence that his or her claim is more probably
17 true than not true. In other words, the evidence
18 supporting the propositions which a party has the
19 burden of proving must outweigh the evidence
20 opposed to it.

21 In determining whether a party
22 has met this burden, you must consider all the
23 evidence, whether it's produced by the plaintiff
24 or the defendant.

25 Some witnesses, because of

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1 education or experience, are permitted to state
2 opinions and the reasons for those opinions.
3 Opinion testimony should be judged just like any
4 other testimony. You may accept it or reject it
5 and give it as much weight as you think it
6 deserves, considering the witness's education and
7 experience, the reasons given for the opinion and
8 all the other evidence in the case.

9 All parties are equal before the
10 law and a partnership is entitled to the same
11 fair and conscientious consideration by you as
12 any party. A partnership can only act through
13 its employees, agents or partners. Therefore a
14 partnership is responsible for the acts of its
15 employees, agents and partners performed within
16 the scope of their authority.

17 A person is presumed to intend
18 the ordinary consequences of his voluntary acts.
19 This presumption is what we call a disputable
20 presumption, which means it may be controverted
21 by other evidence.

22 Plaintiff has asserted a claim
23 against defendant under the Montana Fair Debt
24 Collection Practices Act. In order to prove his
25 claim, plaintiff has the burden of proving the

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1 following: Number 1, that defendant's conduct
2 toward Plaintiff constituted unfair or deceptive
3 acts or practices in the conduct of any trade or
4 commerce; 2, that defendant's conduct caused
5 plaintiff damages; and Number 3, the amount of
6 plaintiff's damages.

7 Plaintiff has asserted a claim
8 for malicious prosecution against the defendant.
9 To prove malicious prosecution, the plaintiff
10 must show the following: Number 1, that a
11 judicial proceeding was commenced and prosecuted
12 against him; Number 2, that the defendant was
13 responsible for instigating, prosecuting or
14 continuing the proceeding; Number 3, that the
15 defendant acted without probable cause; Number 4,
16 that the defendant was actuated by malice; Number
17 5, that the judicial proceeding terminated
18 favorably for the plaintiff; and Number 6, that
19 the defendant's action caused the plaintiff's
20 damages.

21 One who takes an active part in
22 the initiation or continuation of civil
23 proceedings against another has probable cause
24 for doing so if he reasonably believes in the
25 existence of the facts upon which the claim is

1 based and correctly or reasonably believes that
2 under those facts the claim may be valid under
3 applicable law.

4 The fact that a lawsuit ends in
5 favor of the defendant does not prove that the
6 plaintiff lacked probable cause to bring the
7 lawsuit.

8 For purposes of a malicious
9 prosecution claim, the terms malice and malicious
10 mean this: 1, a wish to vex, annoy or injure
11 another person, or an attempt to do a wrongful
12 act established by proof or presumption of law;
13 or, Number 2, that the defendant has knowledge of
14 facts or intentionally disregards facts that
15 create a high probability of injury to the
16 plaintiff, and deliberately proceeds to act with
17 indifference to the high probability of injury to
18 the plaintiff.

19 In determining whether the
20 defendant initiated the lawsuit without probable
21 cause, you may consider whether the defendant
22 could or should have made further inquiry or
23 investigation as an ordinarily prudent person
24 would have made in the same circumstances before
25 initiating the lawsuit.

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1 In determining whether the
2 defendant initiated a lawsuit with malice for
3 purposes of a malicious prosecution claim, you
4 may infer that the defendant acted with malice if
5 you determine, based on the evidence, that the
6 defendant initiated the lawsuit without probable
7 cause.

8 Plaintiff has asserted a claim
9 for abuse of process against the defendant. In
10 order for you to find that a defendant is liable
11 for abuse of process, the plaintiff must prove,
12 Number 1, that defendant had the ulterior purpose
13 of extracting money from the plaintiff that he
14 did not owe; Number 2, that the defendant
15 willfully filed the debt-collection action
16 without a valid claim; and Number 3, that the
17 defendant's actions caused the plaintiff damages.

18 The Montana Rules of Civil
19 Procedure do not state that a party who serves
20 requests for admission must tell the opposing
21 party of the effect of a failure to respond to
22 the requests in a timely manner. The Rules of
23 Civil Procedure state that the signature of an
24 attorney or party constitutes a certificate by
25 the signer that the signer has read the pleading,

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1 motion or other paper, that to the best of the
2 signer's knowledge, information and belief formed
3 after reasonable inquiry, it is well grounded in
4 fact and that it is not interposed for any
5 improper purpose, such as to harass.

6 The Court, prior to the start of
7 this trial, made the final legal findings which
8 you must accept as true: Number 1, that
9 defendant violated the Fair Debt Collection
10 Practices Act by demanding attorneys' fees from
11 Mr. McCullough which were not permitted under
12 Montana law; Number 2, that defendant violated
13 the Fair Debt Collection Practices Act by filing
14 a lawsuit against Mr. McCullough which was barred
15 by the Montana statute of limitations; Number 3,
16 that defendant violated the Fair Debt Collection
17 Practices Act by continuing to maintain a lawsuit
18 against Mr. McCullough which was barred by the
19 statute of limitations in Montana; and Number 4,
20 that defendant violated the Fair Debt Collection
21 Practices Act by serving the requests for
22 admission on Mr. McCullough in an abusive, unfair
23 and unconscionable attempt to collect a
24 time-barred debt.

25 It is the duty of the Court to

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1 instruct you about the measure of damages. By
2 instructing you on damages, the Court does not
3 mean to suggest for which party your verdict
4 should be rendered. The plaintiff has the burden
5 of proving damages by a preponderance of
6 evidence. Damages means the amount of money that
7 will reasonably and fairly compensate plaintiff
8 for any injury you find was caused by defendant.
9 A damage award must be based upon evidence and
10 not upon speculation, guesswork or conjecture.

11 Based upon the Court's
12 determination that defendant violated the Fair
13 Debt Collection Practices Act, you must fix the
14 amount of money that will reasonably and fairly
15 compensate plaintiff for damages that resulted
16 from defendant's violations of the Fair Debt
17 Collection Practices Act. Your award should
18 include any actual damages suffered by the
19 plaintiff as a result of defendant's failure to
20 comply with the Fair Debt Collection Practices
21 Act.

22 Actual damages include damages
23 for personal humiliation, embarrassment, mental
24 anguish and emotional distress. There is no
25 fixed standard or measure in the case of

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1 intangible items such as humiliation,
2 embarrassment, mental anguish or emotional
3 distress. Mental and emotional suffering and
4 distress pass under various names such as mental
5 anguish, nervous shock and the like. It includes
6 all highly unpleasant mental reactions such as
7 fright or grief, shame, humiliation,
8 embarrassment, anger, chagrin, disappointment,
9 worry and nausea. The law does not set a
10 definite standard by which to calculate
11 compensation for mental and emotional suffering
12 and distress. Neither is there any requirement
13 that any witness express an opinion about the
14 amount of compensation that is appropriate for
15 the kind of law.

16 The law does require, however,
17 that when making an award for mental and
18 emotional suffering and distress you should
19 exercise calm and reasonable judgement. The
20 compensation must be just and reasonable.

21 In addition to actual damages,
22 and regardless of whether actual damages are
23 awarded, you may award statutory damages in an
24 amount not to exceed \$1,000 for defendant's
25 violation of the Fair Debt Collection Practices

1 Act. In determining the amount of statutory
2 damages to be awarded, you should consider, among
3 other relative factors, the frequency and
4 persistency of noncompliance by the debt
5 collector, the nature of such noncompliance and
6 the extent to which such noncompliance was
7 intentional.

8 If you find that defendant
9 violated the Montana Unfair Trade Practices Act,
10 maliciously prosecuted plaintiff or abused the
11 legal process, then you must determine the amount
12 of money which would reasonably and fairly
13 compensate plaintiff for all loss caused by the
14 defendant regardless of whether such loss could
15 have been anticipated.

16 If you find for plaintiff on the
17 question of liability, you may award compensation
18 for mental or emotional distress caused by the
19 defendant's conduct. Any compensation to which a
20 plaintiff is entitled should not be reduced
21 simply because the plaintiff was more susceptible
22 to injury than a normally healthy person.

23 Plaintiff has asked for punitive
24 damages, which may be allowed by you, provided
25 you first find that the plaintiff has suffered

1 actual damages. One who has suffered injury
2 through the malice of another may recover, in
3 addition to his or her actual damages, punitive
4 damages for the sake of example and by way of
5 punishing the other parties.

6 Plaintiff must prove all the
7 elements of his claim for punitive damages by
8 clear and convincing evidence. Clear and
9 convincing means evidence in which there is no
10 serious or substantial doubt about the
11 correctness of the conclusions drawn from the
12 evidence. The evidence may be proved by direct
13 or circumstantial evidence.

14 In punitive damage cases, a
15 defendant is guilty of malice if it has knowledge
16 of facts or intentionally disregards facts that
17 create a high probability of injury to the
18 plaintiff, and the defendant either, Number 1,
19 deliberately proceeds to act in conscious or
20 intentional disregard of the high probability of
21 injury to the plaintiff; or, Number 2,
22 deliberately proceeds to act with indifference to
23 the high probability of injury to the plaintiff.

24 If you determine that punitive
25 damages should be awarded against the defendant,

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1 you will be returned to court following the
2 deliberations. Additional evidence will be
3 presented to you relating only to the amount of
4 punitive damages to be awarded. That issue will
5 be argued by counsel and you will return to the
6 jury room to return the amount of punitive
7 damages in this case.

8 When you begin your
9 deliberations, you should elect one member of
10 your jury as your presiding juror. That person
11 will reside over your deliberations and will
12 speak for you here in court. You will then
13 discuss the case with your fellow jurors to reach
14 agreement, if you can do so.

15 Your verdict must be unanimous.
16 Each of you must decide the case for yourself but
17 you should do so only after you have considered
18 all the evidence, discussed it fully with the
19 other jurors and listened to the views of your
20 fellow jurors. Do not hesitate to change your
21 opinion if the discussion persuades you that you
22 should. Do not come to a decision simply because
23 other jurors think it is right.

24 It is important that you attempt
25 to reach a unanimous verdict, but of course only

1 if each of you can do so after having made your
2 own conscientious decision. Do not change an
3 honest belief about the weight and effect of
4 evidence simply to reach a verdict.

5 If it becomes necessary during
6 your deliberations to communicate with me, you
7 may send a note through the bailiff signed by
8 your presiding juror or by one or more other
9 members of the jury. No member of the jury
10 should ever attempt to communicate with me except
11 by a signed writing. I will communicate with any
12 member of the jury on anything concerning the
13 case only in writing or here in open court.

14 If you send out a question, I
15 will consult with the parties before answering
16 it, which may take some time. Continue your
17 deliberations while waiting for the answer to any
18 question.

19 Remember, you are not to tell
20 anyone, including me, how the jury stands,
21 numerically or otherwise, until after you've
22 reached a unanimous verdict or been discharged.
23 Do not disclose any vote count in any note to the
24 Court.

25 May I see the verdict form,

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1 please?

2 As the lawyers have informed you
3 in their closing arguments, the Court has
4 prepared a Special Verdict Form for you. It
5 contains, as you know now from argument, three
6 pages with five questions.

7 I would suggest that you look
8 through the entire verdict and then proceed to
9 work your way through, starting with the first
10 question. After you have reached unanimous
11 agreement on the verdict, your presiding juror
12 will fill in the Special Verdict Form, sign and
13 date it and advise the Court that you're ready to
14 return to the courtroom.

15 That concludes the instructions
16 by the Court. Will the bailiff please come
17 forward and be sworn.

18 (At which time the bailiff is
19 sworn.)

20 THE COURT: We will stand in
21 recess during the jury deliberations.

22 (Court is in recess.)

23 THE COURT: The record will
24 reflect counsel and the parties are present, as
25 is the jury. The jury has given us notice that

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1 they have reached a verdict.

2 Who speaks for the jury? And has
3 the jury unanimously agreed upon a verdict?

4 JURY FOREPERSON: We have.

5 THE COURT: Would you get the
6 verdict from the foreperson.

7 What I'm going to do now is ask
8 the clerk to publish the verdict. And what that
9 means is read it. So she is going to read it,
10 and after she reads it, then either party may ask
11 that the jury be polled. And what that means is
12 each one of you is asked if this was your verdict
13 and if it was correct as read.

14 I'm going to ask now the clerk to
15 publish your verdict and do listen carefully in
16 case any party wishes you to be polled.

17 THE CLERK: In the United States
18 District Court for the District of Montana,
19 Billings Division, *Timothy McCullough v. Johnson,*
20 *Rodenburg & Lauinger*, CV-07-166-BLG-CSO Special
21 Verdict Form.

22 We, the jury, in the
23 above-entitled action, answer the questions on
24 this verdict form submitted to us as follows:
25 Question Number 1, Did Johnson, Rodenburg &

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1 Lauinger violate the Montana Unfair Trade
2 Practices? Answer, Yes.

3 Question 2, Did Johnson,
4 Rodenburg & Lauinger maliciously prosecute the
5 debt-collection lawsuit against Timothy
6 McCollough? Answer, Yes.

7 Question Number 3, Did Johnson,
8 Rodenburg & Lauinger abuse the legal process in
9 the debt-collection lawsuit against Timothy
10 McCollough? Answer, Yes.

11 Question Number 4, What damages
12 do you find were caused by Johnson, Rodenburg &
13 Lauinger? Answer, A, Emotional distress,
14 \$250,000; B, Fair Debt Collection Practices Act
15 statutory damages, \$1,000.

16 Question Number 5, Do you find,
17 by clear and convincing evidence, that punitive
18 damages should be awarded against Johnson,
19 Rodenburg & Lauinger? Answer, Yes.

20 Dated this 16th day of April,
21 2009, Jury Foreperson.

22 THE COURT: Does either party
23 wish the jury to be polled?

24 MR. HEENAN: No, Your Honor.

25 MR. SIMPSON: Yes, we do, Your

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1 Honor.

2 THE COURT: Poll the jury.

3 THE CLERK: If you don't know the
4 number on your badge, that's what I will go by,
5 so look at your number, please.

6 Juror Number 7? Is this your
7 verdict?

8 JUROR NUMBER 7: Yes.

9 THE CLERK: Juror Number 37?

10 JUROR NUMBER 37: Yes.

11 THE CLERK: Juror Number 15?

12 JUROR NUMBER 15: Yes.

13 THE CLERK: Juror Number 32?

14 JUROR NUMBER 32: Yes.

15 THE CLERK: Juror Number 12?

16 JUROR NUMBER 12: Yes.

17 THE CLERK: Juror Number 2?

18 JUROR NUMBER 2: Yes.

19 THE CLERK: Juror Number 1?

20 JUROR NUMBER 1: Yes.

21 THE COURT: Ladies and gentlemen,
22 as I explained to you in the instructions that I
23 gave to you before you retired to deliberate, we
24 will now proceed to the next part of the trial,
25 which concerns the amount of punitive damages to

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1 be awarded. So we will take a brief recess. I
2 will have to meet with the lawyers about that,
3 and then we will come back into court and I will
4 give you further direction as to how we will
5 proceed with that.

6 So bear with us for just a few
7 minutes and we will do this as efficiently as we
8 can.

9 I will see counsel in chambers.

10 (Brief recess.)

11 (The following discussion took
12 place in chambers:)

13 THE COURT: The record will
14 reflect that we are in chambers with only counsel
15 present with the Court, discussing how we will
16 proceed.

17 The first question I have for
18 counsel is, is the plaintiff ready to proceed
19 immediately about the next phase of the case?

20 MR. HEENAN: We are, Your Honor.

21 THE COURT: What witnesses do you
22 intend to call?

23 MR. HEENAN: We intend to call
24 Lisa Lauinger, to establish the net worth of this
25 defendant, and then we are prepared to make

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1 argument.

2 THE COURT: Lisa Lauinger will be
3 the only witness?

4 MR. HEENAN: Yes.

5 THE COURT: Do you have any
6 exhibits that you intend to offer?

7 MR. HEENAN: We do. It's been
8 marked as 112-1, which has not been admitted,
9 Your Honor. You reserved on it.

10 THE COURT: That is the tax
11 return.

12 MR. HEENAN: Correct.

13 THE COURT: Does the defendant
14 intend to offer or call any witnesses at this
15 stage?

16 MR. BOHYER: We would simply
17 examine our own client.

18 THE COURT: Do you have any
19 objections to the admission of Exhibit 112-1 at
20 this time?

21 MR. BOHYER: Yes, we do,
22 relevance of the objection, completeness of the
23 exhibit.

24 THE COURT: I am concerned about
25 the completeness of that and I think the

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1 financial affairs are certainly relevant. I'm
2 not sure that the tax information itself is
3 relevant.

4 MR. HEENAN: If I may, Your
5 Honor. In discovery we requested specifically,
6 there's an interrogatory that asked Johnson
7 Rodenburg to state their net worth for the years,
8 I forget the years, 2007 to present. And I don't
9 know that a dollar amount was ever provided in
10 discovery.

11 This is a document that was
12 provided in discovery, so that's kind of all I
13 have to work off.

14 THE COURT: There's a lot of
15 information on this one page, which is a form
16 1065 from the year 2007, Analysis of Net Income.
17 It contains information such as buildings and
18 depreciable assets, allowance for bad debts, et
19 cetera.

20 Do you intend to use all of this
21 and you contend it is all pertinent? Or is it
22 simply the total assets that are reflected of the
23 partners' capital accounts that are reflected,
24 which is the 2,015,000?

25 MR. HEENAN: It's more than

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1 2,015,000. This is a general partnership, so the
2 assets of the partners are also subject to the
3 net worth inquiry. So certainly I'm allowed to
4 ask about what their distributions are on the
5 partners --

6 THE COURT: I'm talking about
7 this exhibit.

8 MR. HEENAN: I think -- I'm
9 sorry. I thought somewhere on there -- see, they
10 distributed in 2007 \$883,000 to the partnership.
11 Under general partnership law, that's all subject
12 to attachment as well.

13 THE COURT: Does the defendant
14 intend to offer any exhibits?

15 MR. BOHYER: No, Your Honor, we
16 do not.

17 But I do have some reservations
18 about the questions that Mr. Heenan just raised
19 with respect to partnership distributions. It
20 may indeed be subject to attachment, but an
21 inquiry by counsel with respect to the draw of
22 each partner is not relevant to the jury's
23 determination of what the amount of damages
24 should be against the partnership as a whole.

25 If there needs to be essentially

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1 a post-judgement discovery with respect to that,
2 then it might be, but not for this purpose.

3 MR. HEENAN: I don't understand
4 why it's post-judgement -- it's my understanding
5 that this legal entity is a general partnership.
6 And under general partnership law, the net worth
7 isn't just the net worth of the partnership but
8 of the individual partners. And if there's
9 liability with the partnership, then it attaches
10 to the individual partners under corporate and
11 partnership law.

12 THE COURT: The Montana statute
13 on punitive damages states that at this portion
14 of the trial the defendant's financial affairs,
15 financial condition and net worth must be
16 considered.

17 And so the Court, in its rulings
18 on the admissibility of evidence, will be
19 governed by, of course, the Montana statute on
20 punitive damages. So I think the plaintiff can
21 make your objections at the time, but I'm just
22 going to let you know that I think the plaintiff
23 is entitled to present evidence regarding
24 financial affairs and then the parties can make
25 argument with respect.

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1 MR. BOHYER: So I can make sure
2 my record is complete, the entire trial and,
3 indeed, in closing, we heard that Lisa Lauinger
4 is not a defendant here. We heard none of these
5 people are defendants. The defendant is Johnson,
6 Rodenburg & Lauinger.

7 And now the Court is going to
8 allow, as I understand it, inquiry into the
9 personal affairs of each of the partners who
10 aren't defendants in the case?

11 THE COURT: I didn't say that.

12 MR. BOHYER: Maybe I
13 misconstrued.

14 THE COURT: I said the financial
15 affairs of the partnership. The partnership is
16 the defendant.

17 MR. BOHYER: My apologies, Your
18 Honor, I misconstrued what you said.

19 THE COURT: How much time do you
20 need for argument after -- I assume this isn't
21 going to take very long.

22 MR. HEENAN: Five or 10 minutes.

23 THE COURT: For argument?

24 MR. HEENAN: Yes.

25 MR. BOHYER: I think that's fine,

1 Your Honor.

2 THE COURT: The only additional
3 instruction that I would propose to give has been
4 numbered Instruction Number 44, which, as I told
5 you earlier, is the Montana pattern instruction
6 on determining the amount of punitive damages.

7 Is there any objection to the
8 giving of Instruction 44?

9 MR. HEENAN: No, Your Honor.

10 MR. BOHYER: No objection, Your
11 Honor.

12 THE COURT: I have also prepared
13 an additional Jury Verdict Form, and I'm going to
14 add, at the bottom of it, Please sign and date
15 this verdict form and notify the bailiff that you
16 have reached a verdict.

17 With that addition, is there any
18 objection to the Jury Verdict Form for punitive
19 damages?

20 MR. BOHYER: No.

21 MR. HEENAN: No.

22 THE COURT: Do you need a little
23 bit of time or are we ready to go?

24 MR. HEENAN: Ready to go, Your
25 Honor.

1 MR. BOHYER: Let me make sure my
2 client is ready, if we can make sure my client is
3 ready to sit on the stand, then we will be ready
4 to go.

5 (Brief recess.)

6 THE COURT: Court is again in
7 session.

8 Mr. Heenan, you may call your
9 first witness.

10 MR. HEENAN: Thank you, Your
11 Honor. We will call Ms. Lauinger to the stand.

12 THE COURT: Will you please come
13 forward. You've been previously sworn in the
14 case and that goes for all testimony you're about
15 to give. Do you understand that?

16 THE WITNESS: Yes.

17 DIRECT EXAMINATION

18 BY MR. HEENAN:

19 Q. Ms. Lauinger, what was the total income
20 received by Johnson, Rodenburg & Lauinger in the
21 year 2007?

22 A. I don't know.

23 Q. Can I provide you a document?

24 A. Yes.

25 MR. HEENAN: May I approach the

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1 witness, please?

2 THE COURT: You may.

3 BY MR. HEENAN:

4 Q. Can you identify the document I just
5 handed you?

6 A. It's page four of a tax form, 1065.

7 Q. Related to the Johnson, Rodenburg &
8 Lauinger law firm?

9 A. Correct.

10 Q. And does that help you to answer what the
11 income was of Johnson Rodenburg in the year 2007?
12 I have it circled.

13 A. I see Net Income. Is that what you're
14 looking for?

15 Q. Yes, sir.

16 A. 1.4 million.

17 Q. And the year 2007, how much money was
18 distributed to the partners?

19 MR. BOHYER: I object to that on
20 relevance.

21 THE COURT: Overruled.

22 THE WITNESS: Is that where
23 Distributions are?

24 MR. HEENAN: Yes.

25 THE WITNESS: \$883,966.

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1

2 BY MR. HEENAN:

3 Q. In the year 2007, on line 22, what were
4 the total assets of Johnson, Rodenburg & Lauinger?

5 A. Total Liabilities and Capital?

6 Q. Correct.

7 A. 2,060,000.

8 MR. HEENAN: Thank you very much,
9 ma'am. No further questions.

10 THE COURT: You may
11 cross-examine.

12 MR. BOHYER: Thank you, Your
13 Honor.

14 CROSS-EXAMINATION

15 BY MR. BOHYER:

16 Q. Ms. Lauinger, you're the Lauinger in
17 Johnson, Rodenburg & Lauinger, correct?

18 A. Yes.

19 Q. Mr. Heenan just asked you with respect to
20 Exhibit 112 what the total assets of the firm were
21 per that document.

22 Would you look at line 14 of
23 Exhibit 112.

24 A. Yes.

25 Q. What are the total assets there on the

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1 left-hand column, about mid page?

2 A. 1,440,000.

3 Q. That's the one I'm looking at. And what
4 does that line state? Does it say Total Assets?

5 A. Yes.

6 Q. Aside from this lawsuit with Mr.
7 McCullough, have you ever had any other dealings
8 with him?

9 A. No.

10 Q. Lisa, would you please tell the jury if,
11 since the debt-collection case with Mr.
12 McCullough, if your firm has changed its
13 procedures and protocols?

14 A. Yes.

15 Q. Describe for the jury how the procedures
16 and protocols have changed.

17 A. Well, we now require more documentation
18 from our client before proceeding with suit. We
19 have informed our clients of that requirement. We
20 try to watch for red flags and try not to miss
21 them.

22 Q. Could you tell the jury, please, when you
23 instituted the changes for those protocols?

24 A. After Judge Ostby's order that ruled on
25 the motions that were pending in this case where

1 she set forth law, Montana law now, we changed our
2 procedures to comply with that.

3 Q. And do you continue to comply with the
4 Court's order?

5 A. Yes.

6 Q. In terms of the volume of cases that the
7 jury has heard previously, and I may get the
8 number wrong, but something like 2700 cases have
9 been filed in Montana from early 2007 through mid
10 2008. Again, with respect to how you changed the
11 conduct, will you tell the jury how that has
12 changed since Judge Ostby issued her order last
13 fall?

14 A. Because of the additional requirements, we
15 don't have as many lawsuits pending because of the
16 requirements that have been put in place with our
17 clients.

18 Q. After the Court issued its order last
19 fall, did you impose some sort of a moratorium on
20 suit filings?

21 A. Yes, we did. We were very unsure. We are
22 attorneys and we want to represent our clients to
23 the best of our abilities, but we were very unsure
24 as to what we should be doing and what we
25 shouldn't be doing, even with discovery. We

1 didn't know anymore. So we pretty much put a hold
2 toward the end of the year on just proceeding on
3 cases and established some written guidelines and
4 put those in place to, unfortunately, I guess,
5 protect us and our -- I don't know if
6 unfortunately is the right word -- to protect us
7 and our client from further lawsuits.

8 Q. With respect to the dealings the
9 debt-buyer clients such as CACV, have your
10 relationships with those types of entities changed
11 as well?

12 A. Yes, we impose those same requirements
13 on -- we require them to provide us with the
14 documentation verifying the debt prior to
15 proceeding with suit.

16 Q. And aside from Exhibit 112, I wanted to
17 ask you, are you a tax lawyer or business lawyer
18 outside of the creditor relations law that you
19 practice?

20 A. No.

21 Q. Do you understand net worth and
22 liabilities and assets and such?

23 A. Very minimal.

24 Q. Could you tell the jury what your
25 understanding of the firm's net worth was as of

1 the end of 2007 or 2008, please?

2 A. According to the general partner, 1.1
3 million.

4 MR. HEENAN: I will object to the
5 extent this hasn't been produced in discovery.

6 THE COURT: The objection comes
7 too late.

8 MR. HEENAN: I move to strike the
9 answer.

10 THE COURT: Overruled.

11 BY MR. BOHYER:

12 Q. In other words, there is not a substantial
13 difference with the net worth what you're aware of
14 and Exhibit 112. It's a little bit less, correct?

15 A. That's correct.

16 Q. The jury in the underlying case was
17 presented evidence, as I mentioned, regarding the
18 number of other cases that were filed. Did those
19 cases, of 2700 suits filed, did 2700 cases proceed
20 to default judgement?

21 A. No.

22 Q. Could you describe for the jury what
23 happens with those other cases, please?

24 A. Those are cases that were filed in
25 Montana, but those were cases that not all

1 proceeded with default judgement. We have at
2 least 10 percent that we have located the
3 defendant for service. We have others where they
4 contact us to set up payment arrangements. We
5 have many where they filed for bankruptcy. We
6 have, you know, cases where they may put in a
7 response, but they may not have a defense, like an
8 inability to pay, and a motion would be made to
9 the Court for a judgement on the pleadings.

10 We may have some that are disputed
11 and are resolved with a summary judgement motion,
12 but based on evidence from our client, and then
13 there are some that do proceed with default
14 judgement. And all of the cases that do proceed,
15 which I don't know the number, you know, it's not
16 nine out of 10 or 90 percent of 2700. There are a
17 lot of them that are resolved in a lot of
18 different ways.

19 Q. With respect to the issues regarding Mr.
20 McCullough, have you been assessed any sort of
21 punitive damages prior to this hearing today?

22 A. No.

23 Q. Has your firm been subject to any sort of
24 criminal sanction?

25 A. No.

1 Q. How many employees do you have in your
2 firm?

3 A. About 50.

4 Q. And are they dependent upon the law firm
5 for their salaries and well being as well?

6 A. Oh, yeah.

7 Q. So whatever verdict is entered here today
8 will affect them as well?

9 A. Yes.

10 Q. When you got the case originally from CACV
11 and worked it up to the point where Mr. Dendy took
12 it over and filed the lawsuit, would you tell the
13 jury if you had any intention, you personally, did
14 you have any intent to harm Mr. McCullough?

15 A. No.

16 Q. Aside from the debt issue itself?

17 A. No.

18 MR. BOHYER: That's all I have.

19 Thank you.

20 MR. HEENAN: Redirect, please.

21 THE COURT: You may.

22 MR. HEENAN: Thank you, Your

23 Honor.

24 REDIRECT EXAMINATION

25 BY MR. HEENAN:

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1 Q. Ms. Lauinger, Johnson, Rodenburg &
2 Lauinger has previously been found to have
3 violated the Fair Debt Collection Practices Act by
4 a Montana federal court. Isn't that true?

5 A. Yes.

6 Q. Tell the jury how much Johnson Rodenburg
7 had to pay in that case.

8 A. In Furman?

9 Q. Correct.

10 A. \$1,000.

11 Q. And that was prior to the lawsuit?

12 A. Yes.

13 Q. How exactly will this jury's punitive
14 damages verdict affect the employees at Johnson,
15 Rodenburg & Lauinger?

16 A. Well, there's less income for the firm.
17 It affects all of us. It will take away from
18 income or net worth, I guess.

19 MR. HEENAN: That's all I have.
20 Thank you, Your Honor.

21 THE COURT: I would like to see
22 counsel for just a moment. Just stay where you
23 are. This will just take a minute.

24 (The following discussion took
25 place in chambers:)

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1 THE COURT: I have just called
2 counsel into chambers because I wish to add to
3 the instruction that we previously discussed the
4 following sentence: An award of punitive damages
5 may not exceed three percent of the defendant's
6 net worth.

7 Is there any objection from the
8 plaintiff?

9 MR. HEENAN: No, Your Honor.

10 THE COURT: Any objection from
11 the defendant?

12 MR. BOHYER: No, Your Honor.

13 THE COURT: Let's go. I will
14 instruct them in that regard.

15 (Brief recess.)

16 THE COURT: You may close for the
17 plaintiff, Mr. Heenan.

18 MR. HEENAN: Thank you, Your
19 Honor.

20 Ladies and gentlemen, I don't
21 intend to tread the same ground that we already
22 tread this morning. You've obviously been
23 working really hard. You get it.

24 Now and only now, after your
25 verdict, after checking the box for Punitive

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1 Damages do you hear any type of apologies from
2 Johnson, Rodenburg & Lauinger, do you hear any
3 type of acceptance for responsibility.

4 MR. BOHYER: I want to object to
5 that. We can't introduce that evidence now.

6 THE COURT: Overruled.

7 MR. HEENAN: This is the first
8 time. Before your verdict, you heard Mr. Dendy
9 smile and say they did nothing wrong. Then we
10 get the self-serving testimony that boy, we are
11 sure sorry. Gee, shucks, we are really sorry.

12 They weren't sorry until you
13 rendered your verdict and did right by Mr.
14 McCullough and gave him the justice that he asked
15 you for.

16 Now we are on to punitive
17 damages. Punitive damages serve three purposes.
18 Number one, to punish someone for their
19 wrongdoing. You heard about the wrongful
20 conduct. I'm not going to go over it again.

21 Number two, to stop the person
22 or, in this case, the law firm from doing
23 anything like it ever again; to punish them, to
24 make them realize what they did was wrong.

25 And number three, to discourage

1 others, to send a message. Your verdict is going
2 to be in the newspaper. Your verdict is going to
3 go to all the other law firms all around the
4 country that are doing the same type of thing and
5 it's going to force people to take note and force
6 debt collectors to say, you know what? This
7 deadbeat defense doesn't fly. We have to start
8 following the law. And your verdict could do
9 that. Those are the three purposes.

10 You're going to be instructed in
11 a minute that under Montana law the most you can
12 award, the absolute cap, is three percent of a
13 defendant's net worth. In this case that's going
14 to come out to, well, three percent of
15 approximately two million dollars. And I
16 apologize, I don't have a calculator with me.
17 That is a fraction, a fraction, ladies and
18 gentlemen, of the amount of money that that law
19 firm has extracted from people, from their bank
20 accounts, from their wages in the state of
21 Montana and sucked into North Dakota for the
22 profit of these lawyers.

23 And I would ask that you send the
24 message by giving the absolute, the cap here,
25 letting Johnson Rodenburg know that you awarded

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1 everything, the maximum amount that you could to
2 punish this law firm for their conduct.

3 I thank you for your time and
4 your hard work.

5 THE COURT: You may close for the
6 defendant.

7 MR. BOHYER: Thank you.

8 Ladies and gentlemen, I will be
9 brief as well. I stand here hat in hand,
10 obviously. And the couple of things that I
11 wanted to address were these: The purpose of
12 punitive damages, a big one, is to try to
13 convince parties, if their conduct is adjudged
14 wrong, to change so it doesn't recur.

15 Lisa Lauinger has told you what
16 protocols were changed in response to the Court's
17 order of last fall. That has been in place now
18 for about five months. The message has been
19 heard.

20 While Mr. Dendy felt like he was
21 doing okay when he was doing his job, you folks
22 have concluded otherwise. But to punish the
23 defendant more than the \$250,000 it already has
24 been awarded I don't believe is warranted. The
25 message has been gotten by Ms. Lauinger. It's

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1 been gotten by her law firm. They have met, they
2 have talked with clients, they have said, Look.
3 You've got to get these papers to us before we
4 can do it or we are not doing it. So the message
5 is heard.

6 So on behalf of my client, I
7 would ask the jury not to award much. The three
8 percent cap, I'm not going to quibble too much.
9 The net worth is 1.1 million or 1.4. I don't
10 think that another 60 or \$30,000, if that's what
11 is three percent, is warranted. \$250,000 is a
12 lot of money.

13 I thank you on behalf of my
14 client for your time.

15 Thank you, Your Honor.

16 THE COURT: Mr. Heenan, do you
17 have anything further?

18 MR. HEENAN: No, Your Honor.

19 THE COURT: You have heard the
20 additional evidence with respect to the subject
21 of the amount of punitive damages and the
22 arguments of the attorneys.

23 And I have one additional
24 instruction for you that will guide your
25 deliberations on the amount of punitive damages.

1 And it is this: In determining the amount of
2 punitive damages, you should consider all the
3 attendant circumstances, including the nature,
4 extent and enormity of the wrong, the intent of
5 the party committing it, the amount allowed as
6 actual damages, and generally all of the
7 circumstances attending the particular act
8 involved, including any circumstances which may
9 operate to reduce without wholly defeating
10 punitive damages.

11 Punitive damages should be of
12 such an amount as will deter the defendant from
13 and warn others against similar acts of
14 misconduct. Thus, the wealth of the defendant is
15 a fact to be considered by you in determining the
16 amount of punitive damages. An award of punitive
17 damages may not exceed three percent of the
18 defendant's net worth.

19 I have prepared another verdict
20 form for you. It has only one question and the
21 question is, We, the jury, in addition to the
22 amount of damages we have already found were
23 caused, hereby unanimously find the plaintiff is
24 entitled to punitive damages in the sum of, and
25 then based on this instruction that I've given to

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1 you, now you will retire to arrive at a unanimous
2 verdict -- and, again, it must be unanimous -- on
3 the amount of punitive damages.

4 So will the bailiff please come
5 forward? I think we have a different one. Will
6 you swear the bailiff, please.

7 THE CLERK: I swore him in
8 earlier.

9 THE COURT: We will give this to
10 them. Will everyone please rise while the jury
11 retires to consider its verdict.

12 (At which time the jury leaves
13 the courtroom.)

14 (Court is in recess.)

15 THE COURT: Court is in session.
16 Has the jury reached a unanimous
17 verdict on the amount of punitive damages?

18 THE FOREPERSON: We have.

19 THE COURT: Would you please get
20 the verdict form from the foreperson.

21 Once again, I will ask the clerk
22 to publish or read the verdict form. And do
23 listen, because the parties do have the right to
24 ask you, individually, if this is your verdict.

25 THE CLERK: We, the jury, duly

1 empanelled in the above-entitled case, in
2 addition to the amount of damages we already
3 found were caused to the plaintiff, hereby
4 unanimously find that the plaintiff is entitled
5 to punitive damages from the defendant in the sum
6 of \$60,000.

7 Dated this 16th day of April,
8 2009, Jury Foreperson.

9 THE COURT: Does either party
10 wish the jury to be polled on the verdict?

11 MR. HEENAN: No, Your Honor.

12 MR. BOHYER: No, Your Honor

13 THE COURT: That concludes your
14 service as jurors. But before we recess for the
15 evening, I want to thank the lawyers for their
16 professionalism. Being a trial lawyer is a
17 tougher job than it looks like, I will tell you.
18 And these lawyers all performed very capably and
19 I express my appreciation for their
20 professionalism.

21 I want to thank court staff, too.
22 These trials are able to proceed efficiently only
23 because of the court staff, and I appreciate the
24 good work that they do.

25 Most importantly, I thank the

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1 members of the jury. As I explained to you, when
2 we started on Tuesday on the jury selection
3 process, the system can't work unless people are
4 willing to come and set aside their day-to-day
5 activities and serve as members of the jury. So
6 I express my appreciation, on behalf of the Court
7 and the parties, for the hard work that you've
8 done.

9 We will be in recess.

10 (Court is adjourned.)

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1 C E R T I F I C A T E O F O F F I C E R.

2

3 I, Virginia Leyendecker, a Certified Shorthand
4 Reporter and Notary Public, do hereby certify that
5 the foregoing is a true and accurate transcript of
6 the testimony as taken stenographically by and before
7 me at the date, time and location aforementioned.

8 I do further certify that I am neither a relative
9 nor employee, nor attorney or counsel to any parties
10 involved; that I am neither related to nor employed
11 by any such attorney or counsel, and that I am not
12 financially interested in the action.

13

14

15

16 /s/Virginia E. Leyendecker, CSR

17 Notary Public

18 My Commission expires May 3, 2010

19 NJ C.S.R. License No. XI-1701

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